82-1046

No.

In The

Supreme Court of the United States

October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Considering the important public policy in favor of requiring the safe transportation and distribution of natural gas, will this Court permit to stand undisturbed, the reluctant decisions of the United States Court of Appeals for the Third Circuit and of the United States District Court for the Western District of Pennsylvania, that those courts lacked the power — under decisions of this Court — to review and to set aside a voluntary labor arbitration award which ordered the reinstatement of a reckless employee who had been discharged for safety reasons for an irresponsible and dangerous act, in shutting off, contrary to standing orders, the main pipeline supply of natural gas to the Borough of Kane, Pennsylvania, during sub-zero weather and concealing that fact from his superiors, and thereby risking a catastrophe to the community?

2. Did the circuit court and the district court by their decisions to enter judgment upholding the award of the labor arbitrator, ignore the fact that the employer company is required to meet high standards of safety in the transportation and distribution of natural gas, which requirement would preclude the retention on the work force of a reckless employee whose conduct risked a catastrophe to the community?

3. Does the opinion and judgment of the circuit court upholding the labor arbitrator's award in this case amount to judicial condonation of illegal conduct, since the Company did show to the court, in its petition for rehearing en banc, that the reckless acts of the discharged employee constituted conduct prohibited by several sections of the Pennsylvania Crimes Code?

4. Will the decisions of the circuit court and the district court offend against public policy and cause the citizens of Kane and elsewhere to question the quality of judicial administration insofar

as those decisions require a small public utility gas company to rehire a reckless employee whom the company, in the interest of safety, had discharged?

5. Did the circuit court err in its conclusion that the labor arbitrator had not dispensed his own brand of industrial justice and err in its findings that the award had drawn its essence from the labor agreement, notwithstanding that the plain facts appearing in the circuit court's opinion compel the conclusion that the employee had been guilty of the reckless act of deliberately shutting off the main supply of natural gas to the community of Kane in sub-zero weather and concealing that fact from his superiors, which acts would justify his discharge by the Company?

6. Did the circuit court and the district court limit too narrowly their power of review over a labor arbitrator's award in accepting with approval the labor arbitrator's decision which placed the burden on the employer of producing conclusive evidence to support its charges that an employee was discharged for proper cause?

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No.

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KANE GAS LIGHT AND HEATING COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Kane Gas Light and Heating Company prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 12, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported in 687 F. 2d 673 (1982) and appears in Appendix A at pages 1a to 21a.*

* The pagination of the Appendices will be sequential and cumulative. All page reference will be abbreviated "1a", "2a", "3a", etc., regardless of which Appendix contains the material cited.

The order of the court of appeals denying the petition for rehearing en banc appears in Appendix C at page 50a.

The opinion and order of the United States District Court for the Western District of Pennsylvania appears in Appendix B at pages 22a to 35a.

The opinion and award of the arbitrator which is the subject of this action, appears in Appendix D at pages 52a to 63a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered August 12, 1982. A timely petition for rehearing en banc was denied on September 10, 1982 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutory provision involved in this case is in Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a), which provides as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In addition to the foregoing, the following statute and regulations are involved:

1. United States Department of Transportation Regulations "Minimum Safety Requirement for Pipeline Facilities and the Transportation of Gas", 49 CFR §192.623(b) (enacted pursuant to provisions of the National Gas Pipeline Safety Act of 1968, 49 U.S.C.A. §1672). This regulation appears in Appendix C at page 41a.

2. Public Utility Code of Pennsylvania, Title 52 Pa. Code §59.33(a) and (b). Those provisions appear in Appendix C at page 41a.

3. Pennsylvania Crimes Code, 18 Purdon C.P.S.A. §§2705, 3302, 3303 and 3304. Those provisions appear in Appendix C at pages 42a-44a.

STATEMENT OF THE CASE

Petitioner Kane Gas Light and Heating Company is a small company with a total employment of twenty persons. Nine of those employees are members of respondent union and they constitute the field workers, who, under the supervision of two foremen, are charged with assisting in the safe and dependable operation of over two hundred miles of natural gas distribution lines. The Company furnishes natural gas to approximately 3,200 customers in the Boroughs of Kane and Mt. Jewett, Pennsylvania. In addition to households, the customers include factories, commercial establishments, hospitals, schools and housing for senior citizens.

The Company is a public utility and is subject to regulation by the Pennsylvania Public Utility Commission and is required to provide safe and adequate service to its customers. The

Company is subject to the provisions of the United States Department of Transportation Regulations, promulgated under the Natural Gas Pipeline Safety Act of 1968.

The flow of gas into the Borough of Kane in 1979 was controlled by a system of valves at the Borough of Mt. Jewett (nine miles away) at a regulator station. Pritchard, a resident of Mt. Jewett, had been an employee of the Company as a field worker for seven years and only upon instructions from his supervisors, opened and closed valves at that station. Communication was maintained by radio and telephone contact. This station had two principal valves. One was a "by-pass valve", which when turned on bypassed the restrictive effect of the regulators and when opened it increased the gas flow when so required at Kane. The other was a shut-off valve, the main valve, which was used only if it became necessary for shutting off the entire gas supply through one of the transmission lines to Kane. It was shut off only to permit necessary repairs to that transmission line. The valves were not similar, nor located in close proximity. The separate function of each valve was well known to Pritchard.

On the morning of February 9, 1979, when the temperature stood at ten degrees below zero Fahrenheit, Pritchard was instructed to open the by-pass valve by a specific order from the foreman, to increase the flow of gas to Kane due to the extremely cold weather. By eleven o'clock that morning, the gas pressure at Kane had come back to its normal level, and the foreman at Kane ordered Pritchard at Mt. Jewett to close the by-pass valve. However, Pritchard, when he returned to the station, shut off not only the by-pass valve, but he also closed the main valve. He reported back to his foreman in Kane that he had closed the by-pass valve, but he concealed the fact that he had closed the main valve. Closing the main valve effectively cut off most of the gas being transported from Mt. Jewett to the Borough of Kane when the temperature stood at about zero. The supervisor and

the foreman in Kane fortunately noted the drop in gas pressure in Kane and being unable to reach Pritchard by radio or telephone, the foreman drove to the valve station to seek out the reason for the loss of gas supply. The foreman discovered that the main valve was closed and he immediately reopened that valve and increased the gas supply to Kane. Later Pritchard told the supervisor he had closed the main valve because he thought Kane didn't need the gas. Considering the severity of the weather, Pritchard's actions in closing the main valve and concealing that fact caused a high risk and danger to life as well as substantial property damage.

Because of the serious consequences which could have directly resulted from Pritchard's conduct, the Company decided, after reviewing all of the circumstances surrounding the shutting off of the main valve, that there was proper cause to discharge Pritchard. It was the unanimous opinion of the two foremen, the supervisor, the manager and the officers of the Company that he should be discharged for reasons of safety, because his continued employment would not be consistent with the obligations to conduct its operations in a safe manner and without a threat to the safety of the community. The Company premised its decision to discharge Pritchard under Article 1, Section 1 of its Collective Bargaining Agreement with Local 112, which provides:

> The Company retains the right to manage its operations and its direction of the work forces, including the right to make rules and regulations; hire, suspend, discharge for proper cause; . . .

Pritchard's actions, according to the Company, constituted irresponsible insubordination, sabotage, and deliberate restriction of output. Under the Company's "Rules of Conduct for Union Employees", each of these violations carried a maximum penalty of discharge for the first offense.

After Pritchard was fired, the union filed a grievance on his behalf. Subsequently, the president of the Company met with Pritchard and a union representative to discuss the matter further. At that meeting, however, Pritchard failed to give any explanation whatsoever as to why he had closed the main valve. After further review, therefore, the Company reaffirmed its decision to discharge Pritchard for safety reasons.

The union continued to contest the Company's action, and eventually both the Company and the union agreed voluntarily to submit the dispute to arbitration by the American Arbitration Association. This step was taken despite the absence of any provision for arbitration of grievances in the Collective Bargaining Agreement. Both the union and the Company agreed that the question submitted to the arbitrator was whether Pritchard was discharged for proper cause within the meaning of the parties' Collective Bargaining Agreement as well as the Company's Rules of Conduct. The sole question submitted to the arbitrator was "whether the grievant was discharged for proper cause?"

After a hearing, the arbitrator found that Pritchard had acted "errantly, beyond his assigned authority, and beyond the scope of his foreman's orders" and that Pritchard's actions warranted a severe penalty. Concluding that the record established that Pritchard's actions constituted "reckless inadvertence", the arbitrator ordered that Pritchard be reinstated with back pay, with the reinstatement order to take effect thirty days following Pritchard's date of discharge. He further ordered that the period running from the date of discharge to the date of reinstatement be treated as a disciplinary suspension.

Because the Company believed the award was erroneous, the Company brought this action in the district court on April 9, 1980, seeking an order upholding the discharge of Pritchard and vacating the arbitrator's award for manifest disregard of the law and facts.

The union filed a counterclaim, seeking enforcement of the arbitrator's award. Emphasizing the very limited power of judicial review of labor arbitration awards, the district court declined to vacate the award and entered summary judgment for the union on December 19, 1980. The Company then took an appeal to the circuit court and the court of appeals affirmed the district court's order on the grounds that it lacked the power to set aside the award in this case. Thereafter, in response to a point on "Public Policy" specifically raised in the opinion of the court of appeals, the Company filed a petition for rehearing en banc in support of its contention that the award was contrary to Public Policy. That petition detailed those provisions of the Pennsylvania Crimes Code which prohibit reckless conduct such as the court had found the employee had engaged in. The court denied the petition for rehearing en banc without opinion or comment on the content of the petition.

REASONS FOR GRANTING THE WRIT

I.

This Court should review the circuit court's opinion and judgment because a serious question of broad public concern is presented in the matter of judicial administration, namely — should the relative rank of importance to the commitment to finality of labor arbitration awards be more important than the requirements for public safety in the transportation and use of natural gas as dictated by federal and state laws and regulations.

The circuit court held that it and the district court lacked the power to review and set aside an arbitrator's award which ordered the rehiring of an employee who had been discharged for reckless conduct which risked catastrophe to the community.

All of the judges below expressed on the record their uneasiness and discomfort with the decisions they felt obliged to reach in this case.

Judge Knox for the district court stated (33a):

> The Court has reluctantly come to the conclusion that it has no power to disturb the arbitrator's award. Lingering in the court's mind is the question of what would have been done in this case had numerous explosions with resulting deaths occurred as a result of this action? What should be the penalty? Under the rules laid down, however, we have no right to speculate or interfere in this determination.

Judge Garth for himself and Chief Judge Seitz, speaking for the majority of the panel for the circuit court stated (2a):

> In this appeal we are asked by the Kane Gas Light and Heating Company ("the Company") to vacate an arbitrator's award which, after imposing relatively minimal sanctions, reinstated an employee whom the Company had discharged. Were we to sit as the initial factfinders in determination of whether Alan Pritchard, the employee, should be discharged, we would be hard pressed to justify his re-employment. In fact, however, the scope of our review in this case is an exceedingly narrow one, and employing that standard, we conclude that we are obliged to enforce the arbitrator's award, whatever misgivings we may have about its merits or wisdom.

Judge Adams of the circuit court panel, in his concurring opinion stated (20a):

> Judge Garth has aptly set forth the exceedingly narrow standard to which we must adhere in reviewing the arbitrator's decision. Applying this standard, Judge Garth concludes — correctly, I believe — that this Court is without power to disturb the arbitrator's findings and conclusions. Regardless of how impeccable this analysis may be from a legal perspective, however, I have no doubt that the citizens of Kane when they learn of our decision will be astonished at the result. While we may justify our decision as reflecting a national commitment to arbitration, or perhaps simply as the inevitable outgrowth of a line of judicial precedent, the fact remains that today we condone the reinstatement of a person whose actions advertent or not, very nearly had disastrous consequences.

If the judges felt that their decisions would astonish the citizens of Kane, the Company suggests, that they had the inherent power and duty to set aside the award and to protect the safety of the citizens of Kane on the ground that the award could not legitimately draw its essence from the labor contract and was contrary to public policy as being contrary to the requirements of federal and state laws and regulations.

The circuit court failed to apply the standards of review established in the decision of *United Steel Workers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960) and unduly broadened the unreviewable power of the labor arbitrator.

The national commitment to a narrow standard of judicial review of labor arbitrator's awards does not justify the refusal by the courts below to review and set aside an arbitrator's decision which ordered the petitioner, a small natural gas public utility, to rehire a discharged employee whose reckless conduct had risked a catastrophe to the community.

The employer Company must meet high standards of safety in the transportation and distribution of natural gas. Those standards would preclude the retention of reckless employees on the work force.

The judgment of the circuit court, if not set aside, will threaten the ability of the Company to comply with the safety requirements of the Public Utility Code of Pennsylvania, the Regulations of the United States Department of Transportation and the duties of care imposed upon a gas company by the courts.

The Company is subject to the requirements of the Pennsylvania Public Utility Commission, set forth at page 41a of the Appendix, and of the United States Department of Transportation Safety Regulations, set forth on page 41a of the Appendix.

The nature of care required by a gas company and its employees is set forth in the recent decision by Judge Weber in the Western District of Pennsylvania of *Karle v. National Fuel Gas Dist. Co.*, 448 F. Supp. 753 (W.D. of Pa. 1978). The court there carefully reviewed in detail the duties of care imposed upon a gas company at pages 759 and 760. The court states:

> In delimiting the duty of care of gas and electric companies, Pennsylvania courts have emphasized the extreme dangers that elements like gas and electricity present. "Where explosive compounds

are in play, the measure of care arises with the degree of hazard involved." *Hemrock v. Peoples Natural Gas Co.*, 423 Pa. 259, 223 A. 2d 687, 692 (1966). The power of uncontrolled gas and electricity to destroy and disfigure is so great, that upon their purveyors the law imposes the "highest standard of care practicable." *Densler v. Metropolitan Edison Electric Co.*, 235 Pa. Super. 858, 345 A. 2d 758, 761 (1975), quoting with approval *Fitzgerald v. Edison Electric Illuminating Co.*, 200 Pa. 540, 543, 50 A. 161-2 (1901).

II.

This Court should review the circuit court's opinion and judgment because a serious question of broad public concern is presented as to whether the opinion and judgment offends common sense and serious public policy for safety — in forcing a public utility gas company to rehire a reckless employee whose deliberate conduct and concealment of that conduct risked a catastrophe to an entire community.

The opinions of the courts below, in denying their power to vacate the arbitrator's award, would require the Company to rehire an employee whose conduct violated several provisions of the Pennsylvania Crimes Code, which are set forth on pages 42a-44a of the Appendix. They relate to — causing or risking catastrophe, failure to prevent catastrophe, criminal mischief and recklessly endangering another person.

Those sections of the Penal Code are an expression of the modern concern of the Legislature of Pennsylvania for the danger which may threaten the general public from present day potential harm from public catastrophe.

The type of public danger with which the Commonwealth of Pennsylvania was concerned with in the passage of the above cited sections of the Penal Code was the risk of catastrophe to which the reckless employee caused to citizens of Kane, Pennsylvania.

Even without the authority of legislative statutes, public policy as defined by the courts should be heeded in evaluating the effects of the decision by the circuit court in this case.

Public policy has been defined in Pennsylvania in the opinion of Judge Gourley in *McGee v. McNany*, 10 F.R.D. 5 (U.S.D.C. of W.D. of Pa. 1950), at page 12:

> What is public policy? It has been defined in Pennsylvania — "public policy" means the public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy. *Goodyear v. Brown*, 155 Pa. 514, 518, 35 Am. St. Rep. 903 (1983).

This Court has stated in *Building Service Employees International Union, Local 262 v. Gazzam*, 70 S. Ct. 784, 787, 339 U.S. 532 (1950), that:

> The public policy of any state is to be found in its constitution, acts of the legislature, and decision of its courts.

This Court has also stated the meaning of public policy in *Beasley v. Texas & P.R. Co.*, 191 U.S. 492 (1903), as:

> The very meaning of "public policy" is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone.

III.

This Court should review the circuit court's opinion and judgment because a serious question of broad public concern is presented as to whether the opinion and judgment will result in placing a heavy and dangerous burden upon both interstate and intrastate commerce if arbitrators, district courts and circuit courts may force a public utility gas company to rehire reckless employees whose conduct threatened the safety of a community.

It is quite apparent that if the petitioner Company with a work force of eight men was required to rehire the employee as ordered by the circuit court, then the Company will be burdened with the obligation to do something more than it is doing now to protect its customers, its other fellow employees and the citizens of Kane and Mt. Jewett.

Frankly, the Company does not know what it should do. It is a unique problem with which the Company should not be burdened. Admittedly, the problems of the petitioner won't cause a ripple on the national picture. However, the legal precedent in this case that the need for safe operation of a public utility gas company must give way to a higher need to rehire a reckless employee, is strange and frightening indeed.

The small utility would find it almost impossible to rehire a reckless employee and at the same time prevent him from having access to the equipment and valves which could endanger the community. A large company would still find a serious problem in guarding against repetitious and dangerous recklessness. If a catastrophe did occur, the burden and cost to the community,

as well as to the industry, could be ruinous, in both lives and property. In the natural gas industry these additional costs would be an additional burden on the customers who depend on the industry for their heat and other services. These costs are already high and it would be a great and unwelcome burden to unnecessarily increase them further.

IV.

This Court should review the opinions of the circuit court and the district court because a serious question is presented as regards the administration of justice as to whether their opinions and judgments gave judicial condonation to the arbitrator's requirement that the Company employer produce conclusive proof to support its charges that an employee was discharged for proper cause.

The district court in its opinion (25a) stated:

> The arbitrator found (p. 5 of the award) "based on the foregoing it is found that the company has failed to adduce evidence which would support its charges in this matter. Absent is any *conclusive evidence of motivation* on the part of the grievant (Pritchard) to intentionally sabotage the company by deliberately restricting the flow of gas." *Thus, the arbitrator found that there was no evidence which would constitute proper cause* under Article One, Section 1 of the contract for discharge. The burden, of course, was on the company to prove the reasons for its actions. (Emphasis supplied.)

Article One, Section 1 of the Labor Contract appears in the district court's opinion (24a) and in the circuit court's opinion (4a) and states in relevant part:

> The Company retains the right to manage its operations and its direction of the work forces, including the right to make rules and regulations; hire; suspend; discharge for proper cause; . . .

Objection was noted by the Company with the district court's approval of the "conclusive proof" of evidence standard used by the arbitrator and this point was covered in its brief filed with the circuit court of appeals. The Company in its brief pointed out that the parties had stipulated at the outset of the arbitration hearing that —

> the burden, in a discharge case is upon the Company to demonstrate that by a preponderance of the evidence the discharge is warranted.

Notwithstanding the objection the Company made on appeal to the circuit court, that court ignored the objection without comment whatsoever.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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APPENDIX A — COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5114, 82-5115

KANE GAS LIGHT AND HEATING COMPANY,
Appellant in No. 82-5114
Cross-Appellee in No. 82-5115

v.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, Local 112,
Appellee in No. 82-5114
Cross-Appellant in No. 82-5115

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(Civil Action No. 80-0053)

Submitted Under Third Circuit Rule 12(6)
July 22, 1982

Before: SEITZ, *Chief Judge*,
ADAMS and GARTH, *Circuit Judges*

(Opinion Filed August 12, 1982)

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OPINION OF THE COURT

GARTH, *Circuit Judge.*

In this appeal we are asked by the Kane Gas Light and Heating Company ("the Company") to vacate an arbitrator's award which, after imposing relatively minimal sanctions, reinstated an employee whom the Company had discharged. Were we to sit as the initial factfinders in determination of whether Alan Pritchard, the employee, should be discharged, we would be hard pressed to justify his re-employment. In fact, however, the scope of our review in this case is an exceedingly narrow one, and employing that standard, we conclude that we are obliged to enforce the arbitrator's award, whatever misgivings we may have about its merits or wisdom. We also decline to disturb the district court's denial of attorney's fees to the Union which prevailed in this action brought by the Company. Thus, we affirm.

I.

The Company is a natural gas public utility providing service to approximately 3200 customers, most of which are residences, in the Boroughs of Kane and Mount Jewett, Pennsylvania. The flow of gas into the Borough of Kane is controlled by a system of valves at the Mount Jewett Regulator Station ("the Station"), for which Alan Pritchard, an employee of the Company for

seven years, was responsible. This Station had two principal valves. One was a "by-pass valve," which could be opened to increase the gas flow at times of increased demand for gas; the other was a "main valve," which was used only if it became necessary for testing or repair purposes to shut off the main gas transmission line entirely. (App. at 74a, 281-83a).

On the morning of February 9, 1979, Pritchard opened the by-pass valve on the instructions of the foreman in order to accommodate the need for an increased flow of gas due to the extremely cold weather at the time. Several hours later, the gas pressure had risen back to its normal level and the foreman told Pritchard to close the by-pass valve. When he returned to the Station, however, Pritchard not only shut off the by-pass valve, but he also closed the main valve even though he had not been instructed to do so.[1] In closing the main valve, Pritchard effectively cut off gas service to the entire Borough of Kane at a time when the temperature stood at ten degrees below zero (App. at 314a, 323a). Although he failed to inform anyone that he had closed the main valve, Company officials soon noticed that the gas pressure in Kane was dropping, and sent the foreman to the Station to find out why that was happening.[2] Upon arriving at the Station, the foreman discovered that the main valve had been closed; he immediately reopened the valve and restored the gas pressure to its proper level. (App. at 179a-85a).

Considering the severity of the weather, Pritchard's actions in closing the main valve could easily have re-

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1. While it is not clear from the record why Pritchard shut the main valve, apparently the Company contends that the reason was Pritchard's dislike of the foreman. (*See* App. at 13a-14a).

2. The Company officials attempted to get in contact with Pritchard to ask him what was going on, but Pritchard was apparently on the telephone making a long distance phone call at the time and could not be reached.

sulted in danger to life as well as substantial property damage. Indeed, as the President of the Company outlined in his testimony at the arbitration hearing:

> There was a potential for explosion and real disaster. If it hadn't happened that the meters were being monitored at that specific time carefully, we could have had a whole section of Kane lose gas, and the gaslights would go out, creating the possibility that if gas then went on, there would be explosions and fires, or at least that if they went out, that whole section of Kane in the middle of winter would have had to have been cut off, and all of the appliances then relit, according to procedures, which is a monumental task and a very dangerous one.

(App. at 97a).

In light of the seriousness of Pritchard's action, the Company decided, after reviewing all of the circumstances surrounding the closing of the main valve, that there was proper cause to discharge Pritchard. (App. at 81a-82a). The Company premised its decision to fire Pritchard on Article 1, Section 1 of its Collective Bargaining Agreement with Local 112, which provides:

> The Company retains the right to manage its operations and its direction of the work forces, including the right to make rules and regulations; hire; suspend; *discharge for proper cause;* . . .

(Joint Exhibit A). Pritchard's actions, according to the Company, constituted insubordination, sabotage, and deliberate restriction of output. Under the Company's "Rules of Conduct for Union Employees" (*see* Joint Exhibit H), each of these violations carried a maximum penalty of discharge for the first offense.

After Pritchard was fired, the Union filed a grievance on his behalf. Subsequently, the President of the Company met with Pritchard and a Union representative to discuss the matter further. At that meeting, how-

ever, Pritchard failed to give an explanation as to why he had closed the main valve. After further review, therefore, the Company not surprisingly reaffirmed its decision to fire Pritchard.

The Union continued to contest the Company's action, and eventually both the Company and the Union agreed voluntarily to submit the dispute to arbitration by the American Arbitration Association. This step was taken despite the absence of any provision for arbitration of grievances in the collective bargaining agreement.[3] Both the Union and the Company agreed that the question submitted to the arbitrator was whether Pritchard was discharged for proper cause within the meaning of the parties' collective bargaining agreement and the Company's Rules of Conduct, and indeed the parties framed their arguments to the arbitrator in those terms. (App. at 13a).[4]

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3. In arguing that the arbitrator failed to base his decision on the terms of the contract, and that the arbitrator's decision is contrary to public policy, the Company assets in passing that it never agreed to *binding* arbitration. *See* Supplemental Reply Brief of the Company, at 4. Whatever statements may be contained in the affidavits the Company filed in the district court, however, *see* Appendix at 39a-40a, 321a, the Company has not argued before this court that the district court had no basis for its finding that "[b]oth parties agree that there are no disputes of material fact and therefore the matter is ripe for determination by the court" (App. at 41a). The propriety of the district court's decision to resolve the matter on summary judgment is therefore not at issue on this appeal.

4. In its demand for arbitration, the Union characterized the nature of the dispute as "the discharge of Alan Pritchard," and sought as a remedy the reinstatement of Pritchard "with full back pay and all other emoluments." (Joint Exhibit F). In a letter dated July 3, 1969, and addressed to the American Arbitration Association (App. at 321a), the Company acknowledged the Union's request for arbitration and stated that it agreed to arbitration. The Company noted only one difference with the Union's demand, pointing out that this arbitration arose out of a special agreement between the parties and was not undertaken pursuant to the terms of any collective bargaining agreement.

After a hearing held in October and November of 1979, the arbitrator found in a decision dated March 10, 1980, that Pritchard had acted "errantly, beyond his assigned authority, and beyond the scope of his Foreman's orders" (App. at 15a), and that Pritchard's actions warranted a severe penalty. Nevertheless, the arbitrator ruled that the discharge was improper because Pritchard had not acted intentionally or for the purpose of restricting the flow of gas. Concluding that the record established that Pritchard's actions constituted reckless inadvertence, the arbitrator ordered that Pritchard be reinstated with back pay, with the reinstatement order to take effect thirty days following Pritchard's date of discharge. He further ordered that the period running from the date of discharge to the date of reinstatement be treated as a disciplinary suspension. (App. at 15a-17a).

Dissatisfied with the award, the Company brought this action in district court on April 9, 1980, seeking an order upholding the firing of Pritchard and vacating the arbitrator's award for manifest disregard of the law and facts. The Union filed a counterclaim, seeking enforcement of the arbitrator's award. Emphasizing the limited scope of judicial review of labor arbitration awards, the district court declined to vacate the award and entered summary judgment for the Union on December 19, 1980.

The Company then took an appeal (at No. 81-1208) from the district court's order. Because the district court had specifically reserved consideration of the Union's petition for attorney's fees until a later time, however, this court dismissed the Company's appeal for want of an appealable order, citing the then prevailing rule of *Croker v. Boeing Co.*, 662 F.2d 975 (3d Cir. 1981).[5] Sub-

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5. Since that time the Supreme Court has decided White v. New Hampshire Department of Employment Security, ___ U.S. ___, 102 S.Ct. 1162, 71 L.Ed. 2d 325 (1982) (motion for attorney's fees raises legal issues collateral to the merits of the main cause of

sequently, the district court entered an order on December 23, 1981, rejecting the Union's petition for attorney's fees. The Company once again appealed (at No. 82-5114) from the order of the district court, and the Union cross-appealed (at No. 82-5115) in order to contest the denial of its petition for attorney's fees.

II.

In support of its appeal, the Company presents two principal contentions.[6] First, the Company asserts that in ordering Pritchard's reinstatement, the arbitrator disregarded the terms of the collective bargaining agreement, which were binding upon him, and rendered a decision that was arbitrary and capricious. Second, the Company argues that because the arbitrator's award undermines the important public policy in favor of promoting the safe delivery of natural gas service, that award must be vacated even if it does not conflict with the terms of the collective bargaining agreement. We address each contention in turn.

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action and so need not be made within the 10-day period allowed by Fed. R. Civ. P. 59(e) for motions to alter or amend judgment). In Halderman v. Pennhurst State School & Hospital, 673 F.2d 628, 644 (3d Cir.) (Sur Petition for Rehearing), *cert. granted*, 50 U.S.L.W. 3998.01 (U.S. June 22, 1982) (No. 81-2101), this court held that *White* "overrules the portion of our opinion in *Croker* dealing with appealability when [an] application for attorney's fees [has not been] fully determined."

6. The Company has also asserted that the district court erred in failing to apply the standard of review of labor arbitrations set forth in PA.STAT.ANN. tit. 43, §213.13 (Purdon). It is well settled, however, that in suits brought under §301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), which forms the jurisdictional predicate for the Company's action, *federal* law provides the rule of decision. Textile Workers of America v. Lincoln Mills, 353 U.S. 448, 456 (1957). *See also* Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1127 & n.22 (3d Cir. 1969).

Appendix A

A.

In *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969), this court established a narrow standard for reviewing arbitrators' decisions, ruling that

> [t]he interpretation of labor arbitrators must not be disturbed so long as they are not in "manifest disregard" of the law, and that [raising the issue] "whether the arbitrators misconstrued a contract" does not open the award to judicial review.
>
> Accordingly, we hold that a labor arbitrator's award does "draw its essence from the collective bargaining agreement" if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention. . . .

Id. at 1128 (footnotes omitted). *See NF&M Corp. v. United Steelworkers of America*, 524 F.2d 756 (3d Cir. 1975); *Amalgamated Meat Cutters Local 1905 v. Cross Bros.*, 518 F.2d 1113 (3d Cir. 1975); *Textile Workers Union of America v. Cast Optics Corp.*, 464 F.2d 577 (3d Cir. 1972); *Local 616, International Union of Electrical, Radio, & Machine Workers v. Byrd Plastics*, 438 F.2d 973 (3d Cir. 1971). In rejecting a challenge to another arbitration award, moreover, this court has added that "a court is precluded from overturning an award for [the arbitrator's] errors in assessing the credibility of witnesses, in the weight accorded their testimony, or in the determination of factual issues." *NF&M Corp., supra*, 524 F.2d at 759.

This narrow scope of review is mandated by the strong Congressional policy of encouraging the peaceful resolution of labor disputes by means of binding arbitration. In furtherance of that policy, the courts decline to review the merits of arbitration awards so that both employers and unions can be confident in obtaining the decision of the arbitrator for which they have bargained.

See United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-99 (1960).

To be sure, there are limits to the deference accorded to the arbitrator's decision; the arbitrator may not simply "dispense his own brand of industrial justice," *Honold, supra*, 405 F.2d at 1125, quoting *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1965). Thus, if an arbitrator's award is made "in manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop," 405 F.2d at 1128, the courts will not enforce the award.[7] Otherwise, though, so long as the award "draws its essence from the collective bargaining agreement," *id.*, the courts will defer to the arbitrator's decision, a point which has been reaffirmed repeatedly by this court. *See Sun Petroleum Products Co. v. Oil, Chemical and Atomic Workers International Union, Local 8-901*, No. 81-2866 (3d Cir. July 7, 1982), slip op. at 5-6; *Mobil Oil Corp. v. Independent Oil Workers Union*, Nos. 81-2582, 81-2583 (3d Cir. May 18, 1982), slip op. at 4-5; *ARCO-Polymers, Inc. v. Local 8-74*, 671 F.2d 752, 755 (3d Cir. 1982) (per curiam).

Recognizing that our function is limited to ascertaining whether the arbitrator acted within the scope of the parties' arbitration agreement, the Company argues vigorously that in ordering Pritchard's reinstatement, the arbitrator's decision was unfaithful to the terms of the collective bargaining contract, which the parties agreed would be binding on the arbitrator. According to the Company, the evidence adduced before the arbitrator clearly demonstrated cause for discharg-

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7. There are other grounds for refusing to enforce an arbitrator's award, such as fraud, partiality by the arbitrator, and so on. *See Honold, supra*, 405 F.2d at 1128 n.27. With one exception — inconsistency with public policy, which is discused in Section II.B., *infra* — none of these other possible bases for refusing to defer to an arbitrator's decision is relevant to the present case.

ing Pritchard under the Company's Rules of Conduct as incorporated in the collective bargaining agreement. In particular, the Company emphasizes that after receiving an order to close the by-pass valve, Pritchard closed both the by-pass and main valves (App. at 313a, 323a); that it was far from easy to close the main valve — indeed, it took several turns with a wrench to do so; that Pritchard's explanation during the arbitration hearing that he closed the main valve in order to save the Company money was incredible; and that Pritchard admitted that he had failed to report closing the main valve. Based on the evidence in the arbitral record, the Company concludes, the arbitrator improperly found that Pritchard acted unintentionally. According to the Company, the record can only be read as demonstrating that Pritchard's actions were intentional and amounted to insubordination, sabotage, and a deliberate restriction of the Company's output.

In the circumstances of this case, however, we cannot agree that the arbitrator's determination failed to "draw[] its essence from the collective bargaining agreement." In addition, the company had consented to arbitrate and indeed it consented to the appointment of this particular arbitrator. Moreover, the Company agreed to the Union's characterization of the subject matter of the arbitration; as the arbitrator observed, "[t]he grievance protest[ed] the Company's discharge action as being without proper cause." After hearing all the witnesses' testimony and reviewing all the exhibits, the arbitrator concluded that Pritchard had simply made a mistake in judgment.

Admittedly, we find it as difficult as does the Company to comprehend the arbitrator's determination that Pritchard merely made a mistake in judgment. At the hearing, Pritchard's sole explanation for his conduct was that he "just thought [he] was saving the Company some money." (App. at 275a). This explanation would indeed appear to leave something to be desired: a gas company does not save money by preventing customers

from purchasing its product. Nevertheless, the question whether Pritchard's actions violated the Company's Rules of Conduct, or whether any particular witness was convincing or credible, is not one for the courts to decide once the parties have agreed to submit their dispute to arbitration. After "bargaining" for the decision of this arbitrator, the Company cannot avoid his decision merely because the arbitrator may have reached an incorrect result.[8]

Indeed, in at least two recent cases this court has upheld arbitration decisions which appeared to be at least somewhat questionable under the circumstances there presented. In *ARCO-Polymers, supra*, an employee who had been absent for nearly a month claimed that his absence was due to medical reasons, even though there was practically no evidence that illness had anything to do with his failure to report to work. Under the collective bargaining agreement between ARCO-Polymers and the union, four consecutive days of absence of work was sufficient cause for discharge. In *Mobil Oil, supra*, an employee fought on the job and compiled such a generally poor work record that, as an arbitrator later noted, a discharge would clearly be appropriate in the normal case. In both cases, the employer fired the employee, and an arbitrator ordered the employee reinstated, for reasons that according to the em-

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8. While the evidence of "mistake" in the record is minimal, we cannot say that there was no evidence supporting the arbitrator's conclusion that Pritchard made a mistake in judgment. The arbitrator specifically observed that a chronology of events of the valve-closing incident (Joint Exhibit J), prepared by Company Coordinator Michael McCoy, buttressed the credibility of Pritchard's testimony that he, Pritchard, had made a "mistake" and had not acted intentionally. The arbitrator also noted that McCoy had admitted during a hearing held by the Pennsylvania Public Utilities Commission to investigate the valve-closing incident, that he believed Pritchard's action to have been a mistake in judgment. Additionally, a Union official testified that the Company's President had agreed that Pritchard had not acted intentionally. (App. at 239a).

ployer amounted to the substitution of the arbitrator's "own sense of equity" for the terms of the collective bargaining agreement, *see Mobil Oil, supra*, slip op. at 8. And in both cases, this court replied that once an employer "agree[s] to leave to an arbitrator the resolution of disputes whether cause existed for discharge" of the employee, the employer "is bound by [the] award" made by the arbitrator. *Id.*, slip op. at 8.

Nor are we persuaded that *International Brotherhood of Firemen & Oilers, Local No. 935-B v. The Nestle Co.*, 630 F.2d 474 (6th Cir. 1980), upon which the Company relies, in any way indicates that the district court erred in refusing to vacate the arbitrator's award. In *Nestle*, an arbitrator found that the grievant refused a direct order of his foreman several times and called the foreman "a son-of-a-bitch" in the presence of the division manager and other employees. Despite the fact that the collective bargaining agreement provided that insubordination "shall constitute cause for dismissal" the arbitrator awarded the grievant reinstatement without backpay. The Court of Appeals reversed a district court order enforcing the award, concluding that the arbitrator ignored his previous specific findings of insubordination in declining to uphold the discharge. *Id.* at 476.

Nestle, however, merely stands for the proposition — with which we fully agree — that an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement, but, in disregard of those facts and the terms of the agreement, refuses to uphold the discharge. *See also International Union of Operating Engineers, Local No. 670 v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980) (vacating award where the arbitrator ignored provision in agreement that made the giving of false statements to obtain sick leave grounds for discharge). In this case, on the other hand, the arbitrator explicitly found that the Company had not proved that Pritchard had acted "intention-

ally or for the purpose of restricting the flow of gas." (App. at 16a). Thus here, in contrast to *Nestle*, no findings of fact were made that would constitute proper cause for discharge. Indeed, the arbitrator expressly rejected the Company's contentions that Pritchard "was insubordinate in deliberately restricting the flow of gas" or that Pritchard intentionally sabotaged the Company by such an act. (App. at 15a-16a). Rather, as we have noted, the arbitrator found that while Pritchard had acted errantly and beyond the scope of orders, those actions amounted to no more than an error in judgment. And while we have misgivings as to that finding, we cannot say that once it had been made, the arbitrator strayed beyond the four corners of the contract in determining that suspension rather than discharge was the appropriate penalty.[9]

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9. Before the district court the Company apparently raised the question of the propriety of the penalty imposed by the arbitrator. The Company contended that neither the collective bargaining agreement nor the rules of conduct authorized the thirty-day suspension imposed upon Pritchard by the arbitrator. In reference to this argument, the district court held:

> [the arbitrator] was entitled to make his own judgment as to the appropriate penalty considering all the circumstances of the case and the law of the shop. While he found the turning off the valve was reckless, he did not find it was deliberate and intentional in the sense that it was an attempt to sabotage the company's production. There is nothing in the Rules of Conduct which require that on a first offense there be discharge or that that is the only penalty. To enforce such a penalty in all cases would certainly be a draconian form of punishment. The arbitrator interpreted that he had discretion up to discharge under these circumstances and the court cannot fault him for that.

If we were obliged to reach this issue we might very well be persuaded to agree with the district court's analysis. However, the Company has not raised before us the propriety of the particular sanction imposed by the arbitrator. The Company's arguments here raise only the question of Pritchard's discharge, not his suspension. The arbitrator resolved *that* issue by finding that the Company discharged Pritchard without proper cause.

Reduced to its essence, then, the Company's argument consists of complaints that the arbitrator incorrectly interpreted the agreement in light of the evidence and that his findings were erroneous. Based on our review of the transcripts and the documentary evidence, we are inclined to agree: the arbitrator's decision was indeed a dubious one. Nevertheless, we are satisfied that the arbitrator stayed well within the confines of the collective bargaining agreement and the submitted grievance. Thus, while we would not have made the findings made by the arbitrator, and would not have evaluated the evidence as he did, we see no basis under the standard established in *Ludwig v. Honold* for disturbing the arbitrator's award. *See also Mobil Oil Corp. v. Independent Oil Workers Union, supra*; *ARCO-Polymers, Inc. v. Local 8-74, supra.*

B.

In a footnote to its opinion in *Honold, supra*, this court suggested that it might decline to enforce an arbitrator's award on the ground of "inconsistency with public policy." 405 F.2d at 1128 n.27. Generalizing the remark in that footnote, the Company argues that an arbitration award ordering reinstatement must be vacated on the ground of inconsistency with public policy whenever the grounds for the grievant's discharge include acts that violate state or federal law. Here, the company claims that Pritchard's acts violated both federal law[10] and the Pennsylvania policy imposing the "high-

10. The Company cites one of the Department of Transportation Regulations setting "minimum safety requirements for pipeline facilities and the transportation of gas," 49 C.F.R. §192.1. These regulations, the Company points out, provide in part that

> [n]o person may operate a low pressure distribution system at a pressure lower than the minimum pressure at which the safe and continuing operation of any connected and properly adjusted low-pressure gas burning equipment can be assured.

Id. §192.623(b).

est degree of care practicable" on operators of natural gas systems, *Karle v. National Fuel Gas Dist. Co.*, 448 F. Supp. 753, 759 (W.D. Pa. 1978) quoting *Densler v. Metropolitan Edison Electric Co.*, 235 Pa. Super. 858, 345 A.2d 758, 761 (1975)). *See also* PA.STAT.ANN. tit. 52, §59.33. Thus, the Company concludes, public policy requires that we vacate the award reinstating Pritchard.

Significantly, however, the *Honold* court was not directly faced with the question of what circumstances would warrant the vacation of an award on public policy grounds. While it is clear that *Honold* subscribed to a "public policy" standard, it is equally clear that such a standard should have application only where an award conflicts directly with federal or state law.[11] Indeed, this

11. Neither do we find convincing Black v. Cutter Laboratories, 43 Cal. 2d 788, 278 P.2d 905, (1953), *cert. dismissed*, 351 U.S. 292 (1956), which the Company and the *Honold* opinion cite. In *Black*, the California Supreme Court held, over a strong dissent by Justice Traynor, that

> an arbitration award which directs that a member of the Communist Party who is dedicated to that party's program of "sabotage, force, violence and the like" be reinstated to employment . . . is against public policy, as expressed in both federal and state laws, [and] is therefore illegal and void and will not be enforced by the courts.

43 Cal. 2d at ____, 278 P.2d at 911. As evidence of the public policy against "the dangers of the Communist movement" the California Supreme Court cited a number of federal and state statutes, even though none of those statutes required the discharge of the employee in question, and despite the fact that the employee had not been charged with violating any state or federal criminal statute.

We have serious questions about the continued vitality of the majority opinion in *Black v. Cutter*, even though we acknowledge that it does support the principle espoused in *Honold*. In our view, Justice Traynor's dissent in *Black* represents a far more reasoned approach. Moreover, we observe that *Black* was filed before the Supreme Court decided in Textile Workers of America v. Lincoln Mills, 353 U.S. 448, 456 (1957), that federal law governs the review of labor arbitration awards. Because the *Black* court applied principles of *California* common law, that decision in our opinion has little, if any, precedential value today for our purposes.

was the conclusion of the district court in *General Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 249 v. Consolidated Freightways*, 464 F. Supp. 346 (W.D. Pa. 1979). In that case, a union representing truck drivers sought to overturn two arbitrations in which Joint Area Committees denied grievances filed by drivers. In the grievances, the drivers were protesting the fact that they were obliged to drive tractor-trailers, in one instance without mud guards, and in another, without a trailer plate or owner's card. Relying upon the *Honold* footnote, the district court vacated the award, noting that the Joint Area Committee decisions would oblige drivers to violate the Pennsylvania Motor Vehicle Code, PA.STAT.ANN. tit. 75, §§1301, 1331-33, 4533. The court held that enforcement of the arbitration award would have, in essence, sanctioned violations of the Pennsylvania Motor Vehicle Code.

Consolidated Freightways stands for the proposition that an award is inconsistent with public policy when it would condone violations of federal or state law. The decisions of other circuits suggest that absent such a finding that an award condones a violation of federal or state law, the strong federal policy of encouraging labor arbitration dictates the enforcement of arbitration awards. For example, in *International Association of Machinists, District No. 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir.), *cert. denied*, 396 U.S. 820 (1969), the Seventh Circuit rejected a public policy attack on an award ordering reinstatement without back pay of an employee who had pleaded guilty to a misdemeanor violation of state gambling laws for taking bets on company premises. The court concluded that the employee's conviction and his failure to obtain back pay sufficiently vindicated Illinois penal law, and that neither state nor federal law required the arbitrator to uphold the discharge. *Id.* at 1227. *Campbell Soup* relied upon *Local 453, International Union of Electrical, Radio & Machine Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir.), *cert. de-*

ed, 373 U.S. 949 (1963), in which the Second Circuit enforced an arbitration award, holding that enforcement would not amount to judicial condonation of the employee's illegal gambling since the award subjected the employee to a seven-month suspension.

Consideration of *Consolidated Freightways*, *Campbell Soup*, and *Otis Elevator* convinces us that only if upholding an award would amount to "judicial condonation" of illegal acts, should the award be vacated on grounds of inconsistency with public policy. Here, however, it cannot be argued that enforcement of the arbitrator's award, which while reinstating Pritchard did provide for a penalty, would amount to "judicial condonation" of illegal acts. The award does not let Pritchard's actions go unpunished;[12] rather, it subjects Pritchard to a thirty-day disciplinary suspension. The Company has not brought to our attention any federal or state law that would compel the harsher sanction of discharge, no doubt because no such law exists. Thus, we conclude that the award here cannot be vacated on the ground that it is inconsistent with public policy.

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12. The arbitrator concluded:

> Certainly if it were shown that the Grievant had in fact acted intentionally and for the purpose of restricting the flow of gas, the "gravity" of the matter would dictate his removal from the work force. Since the record in major portion establishes the Grievant's act to be one of inadvertence, albeit, reckless, a penalty lesser than discharge must prevail and the Grievance must be sustained to the extent provided for hereinbelow.
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> • • •
>
> The grievance is sustained to the extent that the Grievant is to be reinstated with effect from thirty days following the date of discharge. The period running from the date of discharge to the date of reinstatement shall be treated as a Disciplinary Suspension.

(App. at 16a-17a).

Appendix A

III.

We turn now to the issue of attorney's fees raised by the Union. In the recent case of *Mobil Oil Corporation v. Independent Oil Workers Union*, Nos. 81-2582 and 81-2583 (May 18, 1982), this court addressed the same issue under similar circumstances. There, Mobil Oil had fired one of its employees, and the union submitted the dispute to arbitration and the arbitrator found for the union. After Mobil Oil filed a suit in the district court to vacate the award, the district court granted the union's motion for summary judgment but denied the union's request for costs and attorney's fees. Both the union and the company then appealed.

In upholding the district court's denial of attorney's fees, this court stated:

> Under the American rule, each party normally must bear the burden of its own legal expenses, including attorneys' fees. One of the narrow exceptions to this rule is a finding that the losing party litigated in bad faith, vexatiously, or for oppressive reasons.

Id., slip op. at 10. We must determine, therefore, whether the district court here, after reviewing the relevant authorities and the record before it, abused its discretion when it found that "no factors have been called to our attention justifying a fee award because the plaintiff's actions were in bad faith, vexatious, wanton or oppressive."[13]

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13. Neither party included the district court's opinion of December 13, 1981, in its submissions to this court. Where our standard of review requires us to examine the exercise of the district court's discretion, it should be obvious to the parties that the district court's opinion is essential to our consideration. Indeed, Fed. R. App. P. 30(a) specifically states that "[t]he appellant shall prepare and file an appendix to the briefs which shall contain . . . the judgment, order or decision in question." *See also* Third Circuit Rule 10(3) (same). In this case, having obtained the district court's opin-

In its brief, the Union has pointed to no facts upon which a holding that the district court abused its discretion in denying attorney's fees could be based.[14] In addition, we note that the fact that the Company challenged the arbitrator's award on the merits is not by itself sufficient to justify a grant of attorney's fees to the party seeking enforcement of the award. *Id.*, slip op. at 11. Thus, we reject the Union's challenge to the district court's denial of its petition for attorney's fees.

IV.

We conclude that the limited scope of our review does not permit us to vacate the arbitrator's award, and that that award offended no public policy. Additionally, we hold that the district court did not abuse its discretion in denying attorney's fees to the Union. Accordingly, we will affirm the district court's order (at No. 82-5114), which enforced the arbitration award by granting summary judgment in favor of the Union, and we will also affirm the order of December 23, 1981 (at No. 82-5115), which denied the Union's application for attorney's fees.

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ion through our own efforts, and observing that the cross-appeal presents no difficult questions on the merits, we need not determine whether the failure to comply with Rule requirements is sufficient to warrant dismissal under the standard set forth in Kushner v. Winterthur Swiss Ins. Co., 620 F.2d 405 (3d Cir. 1980).

14. Further, the district court held that

> [t]he only argument made is that the parties should abide by the national policy in favor of arbitration, and that the party who contests an arbitration award in Court should pay attorney's fees to a prevailing party. This may be a good policy but we do not find it to be the law.

Opinion of the District Court in No. 80-53 (December 23, 1981), at 2. We agree.

ADAMS, *Circuit Judge*, concurring.

While I share the majority's concern that federal courts not intrude, except in extraordinary circumstances, in the arbitral process — and while I agree that this case does not present the sort of "extraordinary circumstances" that, under *Ludwig Honold*, warrants the abandonment of judicial restraint — I write separately to express my discomfort at the unfortunate result reached today.

Judge Garth has aptly set forth the exceedingly narrow standard to which we must adhere in reviewing the arbitrator's decision. Applying this standard, Judge Garth concludes — correctly, I believe — that this Court is without power to disturb the arbitrator's findings and conclusions. Regardless of how impeccable this analysis may be from a legal perspective, however, I have no doubt that the citizens of Kane when they learn of our decision will be astonished at the result. While we may justify our decision as reflecting a national commitment to arbitration, or perhaps simply as the inevitable outgrowth of a line of judicial precedent, the fact remains that today we condone the reinstatement of a person whose actions, advertent or not, very nearly had disastrous consequences.

The problem, as I see it, lies not in the legal principles enunciated in *Ludwig Honold*, or even in the rather questionable judgment of the arbitrator — for bad judgment is a risk our system assumes when it subjects arbitrators' decisions to such limited scrutiny — but rather in the contract entered into by Kane Gas that required the company to prove "sabotage," "espionage," or "deliberate restriction of output" before it could subject an employee to a first-offense penalty of discharge. *See* Appendix at 322a. Had the company's burden been lesser — had the company, for example, been required only to show negligence or recklessness — I have little doubt that Alan Pritchard would not be returning to his post.

(Indeed, the arbitrator in this case found that Pritchard's act had been "one of inadvertence, albeit, reckless." Appendix at 16a.) I am both surprised and disturbed that a Kane Gas employee may *not* be dismissed for reckless inadvertence when the conduct in question poses a serious hazard to the lives of the citizens. In such a high-risk occupation, with the safety of entire communities at stake, it would appear prudent, if not essential, for the company to have insisted upon a provision in its contract that would have permitted the discharge of a grossly errant, albeit not intentionally destructive, employee.

In the absence of such a provision, and in view of the rule of judicial deference to arbitrators' decisions, I am bound to arrive at the result reached by the majority.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — DISTRICT COURT OPINION

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-53 Erie

KANE GAS, LIGHT & HEATING COMPANY

v.

INTERNATL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112

December 18, 1980.

KNOX, District Judge

The plaintiff which is a Pennsylvania corporation with its principal place of business in McKean County, Pennsylvania in the Western District of Pennsylvania filed a complaint to review an arbitrator's decision and to vacate arbitrator's award. After various pretrial matters were disposed of, the defendant Local 112 filed a motion for summary judgment. The plaintiff has countered with a motion to vacate the arbitrator's award.

Both parties agree that there are no disputes of material fact and therefore the matter is ripe for determination by the court.

The dispute arises over the discharge of an employee of the company one R. Allen Pritchard which occurred on February 9, 1979, after he, being an employee of the company in charge of the valves on the main transmission line leading from Mount Jewett to Kane Pennsylvania, shut off both the by-pass valve and the

main valve, thus curtailing gas service to the homes and commercial establishments and other facilities in the Borough of Kane. This was on a day in winter when the temperatures were estimated to range from minus ten degrees fahrenheit to plus ten degrees fahrenheit.[1] The gas was off for sometime until the lack of pressure in Kane was discovered and the foreman, being unable to reach Mr. Pritchard at the station in Mt. Jewett, drove to the facility in Mt. Jewett and found that the valves were off. The fact that he had turned the main valve as well as the by-pass valve off was not reported to management. Pritchard when questioned at various times gave various explanations of his conduct, at first claiming it was a mistake and then claiming that it was an attempt to comply with the best interest of the company inasmuch as it appeared Kane was getting an oversupply of gas. Regardless of the conflict and explanations, it is apparent that the determination of this matter was for the finder of fact, to with: the arbitrator.

Plaintiff is a public utility under Pennsylvania law serving gas for heating and industrial purposes to consumers in and about the Borough of Kane and as such had a duty to render proper service. The turning off of these valves obviously could have resulted in large amounts of damage in Kane and considering the severity of the weather could have involved the company in numerous claims for damages to persons and property, although fortunately the valve was turned on again after a lapse of a little less than an hour.

The hazards of turning off the gas completely in weather such as this is demonstrated by the testimony at the arbitrator's hearing, page 12, to the effect that one of the gravest dangers

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1. Kane is known as the "ice box" of Pennsylvania.

is that when the transmission line is void of gas, the pilot lights go out on appliances and furnaces, leaving the valve open with the result when it returns, there is an explosive concentration of gas and air and could cause possibly catastrophic results.

The collective bargaining agreement between the parties entered into on May 28, and effective at the time of the events giving rise to the controversy on February 9, 1979, which was in evidence before the arbitrator provided insofar as is relevant here in Article One, Section 1, as follows:

> "The company retains the right to manage its operations and the direction of the working forces including the right to make rules and regulations; hire; suspend; *discharge for proper cause;* promote; demote; transfer; relieve employees from duty because of lack of work; or for other proper and legitimate reasons; provided that this will not be used for purposes of discrimination against any member of the Union on account of membership."

The parties have further called our attention to Article Ten, Section 2, which provides for settlement and handling of disputes between the company and union as to the meaning or application of the agreement by the filing of grievances with the supervisor and progressing through various stages to a meeting between the President of the company and the international representative. If no satisfactory adjustment is reached, it is provided that both management and the union pledge themselves to make use of the facilities of the Pennsylvania State Mediation Service before any further action is taken. There is no further provision in the contract providing for arbitration or the effect of such arbitration nor is there a no-strike clause in the agreement.

Appendix B

The President of the Company, Mr. English, and the union being unable to resolve their differences and apparently not wishing to resort to the Pennsylvania State Mediation Service, agreed to submit the dispute to arbitration by the American Arbitration Association. The demand for arbitration was made by the union. Names were submitted and the parties agreed upon Mr. Charles L. Mullin, Jr. as arbitrator. Mr. English had, on July 3, 1979, addressed a letter to Mr. John Schano, Regional Administrator of the American Arbitration Association at Pittsburgh concurring in the request for arbitration but noted that this was not properly a demand for arbitration since the agreement did not provide for it but apparently was to be treated as arbitration by mutual consent.

The arbitrator held hearings October 19, 1979, and November 16, 1979, at Kane. At the latter hearing, arguments were held and briefs received. It does not appear that at that time any demand was made for further hearing. The arbitrator found (p. 5 of the award) "based on the foregoing it is found that the company has failed to adduce evidence which would support its charges in this matter. Absent is any conclusive evidence of motivation on the part of the grievant (Pritchard) to intentionally sabotage the company by deliberately restricting the flow of gas." Thus, the arbitrator found that there was no evidence which would constitute proper cause under Article One, Section 1 of the contract for discharge. The burden, of course, was on the company to prove the reasons for its actions.

The arbitrator further found that there was no disciplinary record to support other company charges of prior disciplinary problems with Mr. Pritchard or other instances of insubordination. While there was oral testimony, the arbitrator apparently concluded that if the incidents were serious, they should have been noted on a disciplinary record. The arbitrator found that

under the circumstances the situation was potentially dangerous and that the grievant had acted beyond the scope of a clear and explicit order. The arbitrator said "accordingly while his actions in the instant matter do not warrant discharge, they do warrant severe penalty. The arbitrator held that there was no evidence of intentional action by the grievant and concluded "since the record and major portion establishes the grievant's act to be one of inadvertence albeit reckless, a penalty lesser than discharge must prevail and the grievance must be sustained to the extent provided for herein below". The arbitrator then entered an award sustaining the grievance and holding that the grievant was to be reinstated from 30 days following the date of discharge and granted back pay as defined therein.[2]

Meanwhile, plaintiff received defendant's brief in early January 1970, and made a request to reopen. This was supported by an affidavit (Ex. 4 attached to English affidavit filed August 13, 1980) by Elmer Peterson who had been since 1978, one of the foremen for the company and he makes an affidavit that he does not recall that on any occasion he authorized the closing of both valves which would cut off the gas supply completely

---

2. "The grievance is sustained to the extent that the grievant is to be reinstated with effect from thirty days following the date of discharge. The period running from the date of discharge to the date of reinstatement shall be treated as a Disciplinary Suspension.

"Back pay is granted to the extent of the difference between earnings and Unemployment Compensation, and that amount which the Grievant would have received as earnings had he worked subsequent to his reinstatement as effected herein.

"The undersigned retains jurisdiction for the resolution of any differences arising out of the implementation of this Award."

and on one of the transmission lines leading to Kane. The company complains that the arbitrator should have considered the matter and reopened the hearing. It does not appear that this affidavit would have affected the situation to any degree. It is certainly not newly discovered evidence which would justify a new trial since the evidence was known previous to the arbitrator's hearing, Elmer E. Peterson was in existence prior to the arbitrator's hearing and nothing was done to have him testify about such a matter. This is somewhat similar to where the district court or the court of appeals holds that a judgment NOV should be entered for insufficient evidence on the part of the plaintiff whereupon the plaintiff seeks to introduce further evidence and get another bite at the apple. This is not permitted.

The complaint is that the rules of the American Arbitration Association provide in Rule 32 that "Hearings may be reopened by the arbitrator on his own motion or *on the motion of either party for good cause* shown at any time before the award is made. But if the reopening of the hearings would prevent the making of the award within the specific time agreed upon by the parties, the matter may not be reopened."

As a result of this rule contained in Exhibit B to the complaint, the matter is entirely for the arbitrator to allow reopening of a hearing "for good cause shown". In other words this is a matter purely within the discretion of the arbitrator. In view of the fact that the evidence would appear to be cumulative, and only further attack upon the credibility of Pritchard and would not basically affect the outcome of the case since the arbitrator had the affidavit before him and it was his promise to determine the credibility of the witnesses, we cannot say that the arbitrator abused his discretion in refusing to reopen.

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In the light of the foregoing, the court does not feel compelled to go into depth with respect to the court's powers to remand the case to the arbitrator for further hearing which may be a doubtful question. See Washington-Baltimore Newspaper Guild v. Washington Post Company, 442 F 2d 1234 (D.C. Cir. 1971). The court cannot determine that the arbitrator abused his discretion in not reopening for further hearing. The reopening was denied on March 10, 1980, at the time the award was handed down.

There are various grounds stated to vacate the award, viz: (1) The arbitrator failed to make a finding on proper cause. The court held that this is implicit in his findings that the company did not sustain its burden of showing proper cause to justify a discharge. It is noted on page 5 of the award he dismissed many of the union arguments and indicates:

> "The Grievant admittedly acted errantly, beyond his assigned authority, and beyond the scope of his Foreman's orders, and certainly the fact of the potentially dangerous situation cannot be set aside. Even though the Grievant did not act with intent to cause serious problems for the Company, he did nevertheless act beyond the scope of a clear and explicit order. Accordingly, while his actions in the instant matter do not warrant discharge, they do warrant severe penalty."

(2) The arbitrator failed to make a finding with respect to concealment by Pritchard. The arbitrator did consider the various stories told by Pritchard and the determination of the truth under such circumstances would be entirely a question for the trier of facts, in this case the arbitrator. The mere fact that a plaintiff

contradicts himself does not justify entry of a judgment against him since the trier of fact is free to pick and choose which of the versions he will accept. (3) The arbitrator's award of 30 days suspension is not provided for in the rules. It is true that the rules of conduct for union employees attached to the complaint as Exhibit D do provide for various items of misconduct leading to discharge. The arbitrator refused to find previous matters of misconduct which would justify a discharge since they were not supported by a disciplinary record. It is true that the Rules of Conduct, particularly 24, relative to sabotage or espionage and 27 deliberately restricting output do provide for a first offense penalty of discharge. But since the matte was submitted to the arbitrator under the cases cited below, he was entitled to make his own judgment as to the appropriate penalty considering all the circumstances of the case and the law of the shop. While he found the turning of the valve was reckless, he did not find it was deliberate and intentional in the sense that it was an attempt to sabotage the company's production. There is nothing in the Rules of Conduct which require that on a first offense there be discharge or that that is the only penalty. To enforce such a penalty in all cases would certainly be a draconian form of punishment. The arbitrator interpreted that he had discretion up to discharge under these circumstances and the court cannot fault him for that. The company claims that the agreement provided for discharge for proper cause and the arbitrator made no findings. As heretofore noted, the findings summing up the evidence on both sides are implicit that the company had not brought forth sufficient evidence to justify the drastic penalty of discharge. There was proper cause for some discipline considering the serious danger accompanying such an act and the fact it appears to have elements of recklessness. Again, we can find no purpose to be served by remanding the case to the arbitrator if we could. (4) It is also claimed that the arbitrator ignored 49 USC 1671, et seq, covering transmission of natural gas in interstate commerce and giving the

Department of Transportation the right to adopt rules and regulations governing transportation by pipeline. The rule in 49 CFR Section 192.623 relied on by the company provides against excessively high pressures where there is low pressure gas burning equipment being served and provides that no person shall operate at a pressure lower than the minimum pressure.

As stated above, the matter here was dangerous and could have resulted in numerous claims against the company. In view of the short period of time before the difficulty was rectified, there apparently were no claims for damage and there has been no indication that the Department of Transportation has threatened any penalties against the company as a result of this incident. The court can take judicial notice that when pressure falls in a gas line the result is that pilot lights go out and that when pressure is restored, there may be explosions unless notice is given and precautions taken but the court fails to see how this would change the penalty to be imposed upon an employee who turned off a valve. All we can say that this is a matter for the arbitrators to determine the appropriate penalty and whether or not the court would have imposed a more drastic penalty in view of the dangerous situation created is beside the point.

It is noted that this is not the usual case where the collective bargaining agreement itself provides for reference of disputes to arbitration and the selection of the arbitrator. In this case, however, after the event, the parties jointly agreed to submit the dispute to arbitration and the court sees no difference between such an arbitration and one provided for in the original collective bargaining agreement. There was an agreement to submit to arbitration and the court determines that this is appropriate for enforcement under Section 301 of the Labor Management Relations Act (29 USC 185(a)) which provides for suits for violation of contracts between an employer and a labor

organization representing employees in an industry affecting commerce may be brought in any district having jurisdiction of the parties.

Once we have arbitration under a contract enforceable under 301, the scope of review is clear as laid down by the U.S. Supreme Court, by the Court of Appeals for this Circuit and previously followed by this court in other similar cases.

The basic case in this circuit relative to the scope of review by a district court with respect to enforcement or vacation of an arbitrator's award under a labor agreement is Ludwig Honold Mfg. Co. v. Fletcher, 405 F 2d 1123 (3d cir 1969). There the court in an opinion which is binding on us and which prevents us from redoing the arbitrator's award said, quoting USW v. Enterprise Corp., 363 US 593:

> "It is the arbitrator's construction which was bargained for and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because of their interpretation of the contract is different from his.
>
> "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, *yet his* award is legitimate only so long as it draws its essence from *the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

The court further said:

> "Each case seems to have fashioned its own standard, and among those variously employed have been: the reviewing court should not disturb the award so long as the interpretation was no arbitrary, or 'even though the award permits the inference that the arbitrator may have exceeded his authority', or merely because it believes that sound *legal principles were not applied; the court should interfere 'where the arbitrator clearly went beyond the scope of the submission', or where the authority to make* * * * award cannot be found or legitimately assumed from the terms of the arbitration agreement', or if the arbitrator made a determination not required for the resolution of the dispute."

We cannot find that any of these situations exist here to justify the disturbance of the arbitrator's award. The appeals court further held:

> "Accordingly, we hold that a labor arbitrator's award does 'draw its essence form the collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award."

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The United States Supreme Court has said in USW v. American Mfg Co., 363 US 554 (1960) that courts have no business weighing the merits of a grievance for interpretation of a contract in a labor arbitration award.

The members of this court of course are bound by the decisions of the circuit and of the United States Supreme Court and have many times adopted the narrow view of powers to disturb an arbitration award in a labor situation. See Teamsters Local 249 v. Potter McCune Co., 412 FS 8 (W.D. Pa. 1976) and also Service Personnel and Employees of the Dairy Industry Teamster's Local 205 v. Carl Colteryahn Dairy Inc., 436 FS 341 (W.D. Pa. 1977) where we held that the arbitrator's action in going beyond the strict language of the contract to get at its purpose and intent was proper and an award would be upheld.

The court has reluctantly come to the conclusion that it has no power to disturb the arbitrator's award. Lingering in the court's mind is the question of what would have been done in this case had numerous explosions with resulting deaths occurred as a result of this action? What should be the penalty? Under the rules laid down, however, we have no right to speculate or interfere in this determination.

An appropriate order will be entered granting defendant's motion for summary judgment and denying plaintiff's motion to vacate the award.

s/ William W. Knox
U.S. District Judge

APPENDIX B — DISTRICT COURT ORDER

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-53 Erie

KANE GAS, LIGHT & HEATING COMPANY

v.

INTERNATL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112

AND NOW, to wit, December 18, 1980, upon consideration of defendant's motion for summary judgment and plaintiff's motion to vacate the arbitrator's award and the briefs and arguments of the parties,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) Defendant's motion for summary judgment shall be and the same hereby is granted.

(2) Judgment is hereby entered in favor of defendant and against plaintiff.

(3) The complaint is dismissed.

(4) The counterclaim is sustained.

(5) The arbitration award of arbitrator Charles L. Mullen, Jr., shall be confirmed and implemented in its entirety by plaintiff.

(6) The arbitrator has provided in his award for retaining jurisdiction for resolution of any differences arising out of implementation of this award with respect to details of enforcement application shall first be made to the arbitrator subject of course to review by this court of his decisions but this shall not affect the finality of this judgment.

(7) The question of award of attorney's fees to defendant's counsel will be determined at a later date upon presenting of proper petition therefor with affidavits and other material attached supporting a claim for counsel fees under the decisions of the United States Court of Appeals for this Circuit, but this shall not affect the finality of the judgment entered this day.

s/ William W. Knox
U.S. District Judge

CC:

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APPENDIX C — COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5114/15

KANE GAS LIGHT AND HEATING COMPANY
606 N. Fraley Street Plaza
Kane, PA 16735,

Appellant in *No. 82-5114*

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112
606 N. Fraley Street Plaza
Kane, Pa 17635,

Appellant in *No. 82-5115*

(D.C. Civil No. 80-00053B Erie)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;* ADAMS and GARTH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on July 22, 1982.

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 19, 1980 (C.A. No. 82-5114), which enforced the arbitration award by granting summary judgment in favor of the Union, and the order of the said District Court entered December 23, 1981 (C.A. No. 82-5115), which denied the Union's application for attorney's fees, be, and the same are hereby affirmed. Costs taxed against appellants in each case.

ATTEST:

s/ SALLY MRVOS
Clerk

August 12, 1982

APPENDIX C - PETITION FOR REHEARING

In The
UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 82-5114

KANE GAS LIGHT AND HEATING COMPANY,

Plaintiff-Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Pennsylvania

PETITION FOR REHEARING EN BANC

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To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

Plaintiff, Appellant, Kane Gas Light and Heating Company, (hereinafter "Company") respectfully petitions this Court for a rehearing of its panel decision of August 12, 1982. That decision was by an opinion written by Garth, Circuit Judge, and joined in by Seitz, Chief Judge. Adams, Circuit Judge, concurred with the decision by a separate opinion. The decision affirmed the lower court (Knox, District Judge), confirming the Arbitration Award of Charles L. Mullen, Jr., who ordered the reinstatement of a discharged, reckless employee, whose conduct clearly constituted grounds for discharge under the labor contract and work rules.

The Company appellant suggests that the Opinion of the panel does not square with the standards of proper review of a decision of an arbitrator set forth in this Court's decision in *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F.2d 1123 (3rd Cir. 1969). Nor does it square with the standard of proper review established by the Supreme Court in its decision in *United Steelworkers of America v. Enterprise Wheel and Car Corp.,* 363 U.S. 593; 4 L.Ed. 2d 1424; 80 S.Ct. 1358 (1960).

In the *Ludwig Honold* decision, supra, this Court made clear that a reviewing court may disturb an arbitration award where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop. Also, that an arbitration award may be vacated where it is shown that there was fraud, partiality or other misconduct on the part of the arbitrator, or the award violates specific command of some law, or because the award is too vague and ambiguous for enforcement, or because of inconsistency with public policy.

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In the *United Steelworkers v. Enterprise Wheel and Car,* supra, the Supreme Court clearly established guidelines that an arbitrator does not sit to dispense his own brand of industrial justice, nor may he manifest an infidelity to his obligation to look to the collective bargaining agreement for the essence of the award.

The Arbitrator's Award is Inconsistent With Public Policy Since It Condones Acts Which Are In Violation of Law.

On Page 15 of the panel's Slip Opinion, it is stated:

> While it is clear that *Honold* subscribed to a "public policy" standard, it is equally clear that such a standard should have application only where an award conflicts directly with federal or a state law.

At the conclusion of the panel's Opinion regarding the Company's appeal (page 17 of the Slip Opinion) the panel states:

> The Company has not brought to our attention any federal or state law that would compel the harsher sanction of discharge, no doubt because no such law exists. Thus we conclude that the Award here cannot be vacated on the ground that it is inconsistent with public policy.

On the facts outlined by the panel on pages 2, 3, 4 of the Slip Opinion, as to the conduct of the employee — the Arbitrator's Award, as well as the District Court's Opinion and this Court's panel Opinion would condone acts which would constitute violations of both federal and state laws. Such laws include:

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(1) U.S. Dept. of Transportation Regulations "Minimum Safety Requirements for Pipeline Facilities and the Transportation of Gas" 49 CFR Sec. 192.1 (192.623(b)).

No person may operate a low pressure distribution system at a pressure lower than the minimum pressure at which the safe and continuing operation of any connected and properly adjusted low-pressure gas burning equipment can be assured.

(2) Public Utility Code of Pennsylvania (Title 52 Pennsylvania Code Sec. 59.33)

Sec. 59.33 Safety

(a) *Responsibility.* Each public utility shall at all times use every reasonable effort to properly warn and protect the public from danger, and shall exercise all reasonable care to reduce the hazards to which employees, customers, and others may be subjected by reason of its equipment and facilities.

(b) *Safety Code.* Unless otherwise authorized by the Commission, the minimum safety standards for all gas transmission and distribution facilities in this Commonwealth shall be those pursuant to the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. Sect. 1671, including all subsequent amendments thereto, effective as of the date stated in the Federal Register.

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(3) Pennsylvania Crimes Code, 18 Purdon C.P.S.A. 3302

Causing or Risking Catastrophe

(a) *Causing Catastrophe* - A person who causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, release of poison gas, radioactive material or other harmful or destructive force or substance, or by any other means of causing potentially wide spread injury or damage, commits a felony of the first degree if he does so intentionally or knowingly, or a felony of the second degree if he does so recklessly.

(b) *Risking Catastrophe* - A person is guilty of a felony of the third degree if he recklessly creates a risk of catastrophe in the employment of fire, explosives or other dangerous means listed in subsection (a) of this section.

(4) Pennsylvania Crimes Code, 18 Purdon C.P.S.A. 3303

Failure to Prevent Catastrophe

A person who knowingly or recklessly fails to take reasonable means to prevent or mitigate a catastrophe, where he can do so, without substantial risk to himself, commits a misdemeanor of the second degree if:

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(1) He knows that he is under an official contract and or other legal duty to take such measures; or

(2) He did or assented to the act causing or threatening the catastrophe.

(5) Pennsylvania Crimes Code, 18 Purdon C.P.S.A. 3304

Criminal Mischief

(a) *Offense Defined* - A person is guilty of criminal mischief if he:

(1) damages tangible property of another intentionally, recklessly, or by negligence in the employment of fire, explosives, or other dangerous means listed in Sect. 3302(a) of this title (relating to causing or risking catastrophe).

(2) *Grading* - Criminal mischief is a felony of the third degree if the action intentionally caused pecuniary loss in excess of $5,000 or a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service.

(6) Pennsylvania Crimes Code, 18 Purdon C.P.S.A. 2705

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Recklessly Endangering Another Person

> A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

The Award of the Arbitrator is Inconsistent With Public Policy Because it is Injurious to the Public Safety and Offends the Public Good

What is "public policy"? The term has been defined in hundreds of cases, as reference to Volume 35 of "Words and Phrases" will reveal. A definition from Pennsylvania Courts as to the meaning of "public policy" is set out in the opinion of Judge Gourley in *McGee v. McNany* (U.S.D.C. for the W.D. of Pa. 1950), 10 F.R.D. 5 at page 12:

> What is public policy? It has been defined in Pennsylvania - "public policy" means the public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for the individual rights, whether of personal liberty or of private property, which any citizen ought to feel is against public policy. *Goodyear v. Brown*, 155 Pa. 514, 518; 26 L.R.A. 838; 35 Am.St.Rep. 903.

In that case of *Goodyear v. Brown*, cited above, Justice Williams stated with reference to the conduct of a self dealing

public official whose acts were determined to be contrary to public policy:

> But it does not follow that everything may be done by a public officer that is not forbidden in advance by some act of the assembly.

It is apparent that inconsistency with public policy is not coextensive with violations of some federal or state laws. It is a broader concept.

The Supreme Court has defined the meaning of "public policy" in the case of *Beasley v. Texas & P.R. Co.*, 24 S.Ct. 164, 166; 191 U.S. 492, 498; 49 L.Ed 274, as:

> The very meaning of "public policy" is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone.

The Supreme Court has also stated in *Building Service Employees International Union, Local 262 v. Gazzam*, 76 S.Ct. 784, 787; 339 U.S. 532; 94 L.Ed. 1045, that:

> The public policy of any state is to be found in its constitution, acts of the legislature, and decision of its courts.

In *Driver v. Smith*, 101 A. 717, 725; 89 N.J.Eq. 339, it is stated that:

> "Public Policy" is that principal of law holding that no person can lawfully do that which has a tendency to injure the public, or which is against

> the public good, and is sometimes designated as the policy of the law, or public policy in relation to the administration of the law.

Various Courts have defined the term in the following language:

> "Public policy" in substance is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare and the like, being the general and well settled opinion relating to man's plain palpable duty to his fellow man. See *Hanks v. McDanell*, 210 S.W. 2d 784, 786; 307 Ky. 243; 17 A.L.R.2d 1; *Snyder v. Ridge Hill Memorial Park*, 22 N.E. 2d 559, 566; 61 Ohio App. 271; *Truax v. Ellett*, 15 N.W. 2d 361, 367; 234 Iowa 1217.

The Arbitrator's Award Constitutes His Own Brand of Industrial Justice and Manifests an Infidelity to his Obligation to Deal Fairly with the Plain Facts and the Terms of the Contract.

The panel, by its opinion, would approve the arbitrator dispensing his own irrational brand of industrial justice, contrary to the guidelines in the *Steelworkers v. Enterprise* case supra and the *Honold* case supra. By the terms of the contract, the Company retained the right to manage its operations and its direction of the work force, including the right to make rules and regulations, hire suspend and discharge for proper cause.

The Company did establish certain work rules, but certainly these rules should not be construed as being the exclusive causes for discharge and discipline, as suggested in the panel's Opinion.

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Included in the work rules however, were three specific acts which were brought into sharp focus by the conduct of this particular employee:

> *Insubordination* - which carried a first offense penalty of 1 week or discharge (which penalty of course, was to be determined at the option of the Company - considering the gravity of the first offense). For a second offense, the penalty was discharge.
>
> *Deliberately restricting output* - which carried a first offense penalty of discharge.
>
> *Engaging in sabotage* - which carried a first offense penalty of discharge.

Consider the facts outlined by the Court on pages 2 3 and 4 of the Slip Opinion. The testimony conclusively proved that the employee intentionally and deliberately (and not by inadvertance) shut the main gas valve and greatly restricted the flow of gas to Kane when the temperature was near zero. He told no one in the Company of his action. The employee's explanation of his "reason" for doing what he did is absolutely unworthy of belief. It suffices to say that the facts recited by the arbitrator in his award and by the panel, conclusively established that he could have have had no legitimate excuse for closing that valve. The only fair inference of his motive was and is that either he wished to cause a catastrophe or he wished to confound and mystify his foreman and supervisor, and to disrupt normal activities.

It is irrational and capricious for the Arbitrator to ignore the plain facts which he details in his opinion and to base his

Award upon an incorrect and distorted summarization of those facts claiming it was not shown that the employee had acted intentionally and for the purpose of restricting the flow of gas. At the least his conduct amounted to reckless insubordination. The employee himself admitted at the hearing that he knowingly shut the valve and that he intended to shut off the gas to Kane. For the Arbitrator to have closed his eyes to the plain facts is irrational and manifests an infidelity to his obligation.

As a matter of simple justice and basic public policy, this Court should not condone an award based upon such conduct.

The Company suggests that by applying the standard set out in the recent case of *International Brotherhood of Firemen and Oilers v. The Nestle Co.*, 630 F.2d 474 (6th Cir. 1980), the Arbitrator's Award should be vacated because the arbitrator has found facts which under the Contract and work rules would merit discharge.

Conclusion

In both the lower court's opinion in this case, by Judge Knox, and in the panel decision in this Court, there are expressions of concern about the effect on the public good and the feeling of discomfort at the unfortunate result reached in the decision to approve the Arbitrator's Award.

Becasue of the exceptional importance in the matter of public safety, the Company urges the Court to grant the requested rehearing, to reconsider its panel opinion and to arrive at a further judgment and decision which is inconsistent with the public good of the community and vacate the Arbitrator's Award.

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We express a belief based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in the Court, to-wit, the panel's decision is contrary to the decision of this Court in the *Ludwig Honold v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969) and the decision of the Supreme Court of the United States in *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593; 4 L.Ed. 2d 1424; 80 S.Ct. 1358 (1960).

This appeal involves a question of exceptional importance - the public safety in gas distribution. The results of this appeal will be of concern to the public and to companies serving the public with gas and other hazardous substances.

Respectfully Submitted

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Attorneys for Appellant
Kane Gas Light and Heating Company

August 24, 1982

APPENDIX C — COURT OF APPEALS ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-5114/5

KANE GAS LIGHT AND HEATING COMPANY,

Appellant in No. 82-5114,
Cross-Appellee in No. 82-5115

v.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, Local 112,

Appellee in No. 82-5114,
Cross-Appellant in No. 82-5115

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by KANE GAS LIGHT AND HEATING COMPANY, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

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voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

s/ SEITZ, CJ
Judge

DATED: SEP 10 1982

APPENDIX D — OPINION AND AWARD OF ARBITRATOR

IN THE MATTER OF ARBITRATION
BETWEEN
KANE GAS LIGHT AND HEATING COMPANY
AND
INTERNATIONAL BROTHERHOOD OF
FIREMEN AND OILERS, LOCAL NO. 112

BOTH OF KANE, PENNSYLVANIA

DECISION IN GRIEVANCE INVOLVING DISCHARGE
(R.A. PRICHARD)

AAA FILE NO.: 55-30-0206-79

GRIEVANCE:	The grievance protests the Company's discharge action as being without proper cause.
AWARD:	The grievance is sustained to the extent set forth hereinafter.
HEARINGS:	October 19, 1979 and November 16, 1979; Kane, Pennsylvania.
ARBITRATOR:	Charles L. Mullin, Jr.

APPEARANCES

For the Company	For the Union
J. A. Bowler, Attorney	J. Walters, Esq., Counsel
J.W. English, President	S. Simons, International Representative
L. Baum, Office Manager	

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M. McCoy, Coordinator R.A. Pritchard, Grievant
J. Wolfgang, Foreman

Administration

By letter dated July 31, 1979, the undersigned was notified by the Pittsburgh Regional Office of the American Arbitration Association of his selection by the Parties to hear and decide a matter then in dispute between them. Hearings went forward on October 19, 1979 and again on November 16, 1979, where both Parties presented testimony, written evidence and arguments in support of their respective positions and where the Grievant appeared and testified in his own behalf. Post Hearing Briefs were duly filed and exchanged, whereupon the record was closed. The matter is now ready for final disposition.

Grievance and Question To Be Resolved

On February 19, 1979 the following Grievance (Joint Exhibit-D) was filed:

> That the discharge of *R. Allen Pritchard* was unjust and with no cause.
>
> Article 1 Section 1
>
> Article 10 Sections 1 thru 3
>
> Adjustment desired:
>
> To be returned to job with full contract benefits applied immediately including full back wages.

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The question to be resolved is whether the Grievant was discharged for proper cause.

Cited Portions Of The Agreement

The following portions of the Agreement (Joint Exhibit-A) were cited:

> ARTICLE ONE - MANAGEMENT:
>
> *Section 1.* The Company retains the right to manage its operations and the direction of the working forces including the right to make rules and regulations; hire; suspend; discharge for proper cause; promote; demote; transfer; relieve employees from duty because of lack of work; or for other proper and legitimate reasons; provided that this will not be used for purposes of discrimination against any member of the Union on account of membership.

Factual Background

Kane Gas Light and Heating Company purchases gas from the North Penn Gas Company which is supplied to the Company's lines at Mt. Jewett, Pennsylvania. The bulk of this gas is transmitted to Kane, Pennsylvania through two separate transmission lines. The pressure and supply of gas to Kane is controlled by valves located in the Company's 5th Street Regulator Station in Mt. Jewett; however, the pressure and supply is monitored at the Company's chart room in Kane.

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The Grievant, a general field worker with some seven years seniority with the Company, was assigned for the most part to Mt. Jewett and surrounding areas. As part of his many and varied job assignments the Grievant, upon instruction, would open and close *various* valves at the 5th Street Regulator Station, as related to pressure and supply needs at Kane.

On February 9, 1979 at 7:00 A.M. the pressure in the line to Kane was low due to cold weather and increased demands. In order to increase the pressure, the Foreman called the Grievant and instructed him to, "open the by-pass-valve". The Grievant opened the by-pass valve and then informed the Foreman that the valve was open.

By 11:00 A.M. the pressure to Kane had returned to normal and the Foreman communicated with the Grievant requesting that he, "close the by-pass valve." The Grievant returned to the 5th Street Station and closed both the "by-pass valve" and the "main valve." He then reported to the Foreman that he had, "closed the by-pass valve."

At 11:40 A.M. the Coordinator at Kane discovered that the gas line pressure to Kane was dropping again. He attempted to reach the Grievant by telephone, however, the line was busy, whereupon he dispatched the Foreman to Mt. Jewett.

Upon arrival the Foreman discovered that the valve on the main transmission line had been closed, whereupon he reopened the "main valve" and the gas line pressure was restored to Kane.

During the course of the Foreman's reopening the main valve, the Grievant, who had finally been reached by the Coordinator, arrived and admitted that he had, "Made a Mistake". The Foreman thereupon directed the Grievant to go home.

Later that same day the Grievant was ordered to report to the Coordinator's office in Kane where he was questioned regarding the incident.

On February 13, 1979 the Grievant was informed by letter (Joint Exhibit-B) that his employment had been terminated.

The instant grievance was filed on February 19, 1979, protesting that the Discharge was without cause. When the Parties were unable to resolve the matter it was appealed to arbitration hereunder.

Contentions Of The Parties

Company Contentions

The Company contends that the Grievant closed the main valve without orders or authorization and then concealed this action by not reporting it to his Foreman thus creating a highly dangerous situation for its customers. The Company submits that the Grievant was insubordinate in deliberately restricting the flow of gas, and indeed, charges him with sabotage. The Company argues that since these actions are, under its Rules of Conduct, dischargeable offenses the discharge here was for proper cause.

Union Contentions

The Union contends that the Grievant's actions on February 9, 1979 were the result of an error and not the result of any intent on the part of the Grievant to interfere in any way with the operations of the Company. It argues that the discharge was without proper cause inasmuch as the Company has not demonstrated that an act of sabotage was committed or that the flow of gas

was deliberately restricted, or that the Grievant's cited actions constituted insubordination.

Discussion And Findings

The Grievant did act improperly when he closed the valve on the main transmission line without instructions to do so. The question at issue is whether he intentionally closed the "main valve" in an act of insubordination, deliberately restricting the output, and whether this incident involved sabotage.

The Company takes the position that the Grievant's actions were not a "mistake" but rather, a purposeful act intended to confuse and embarrass the Foreman and Coordinator by causing an unexplained loss of pressure. The Company explains the Grievant's action by relating to the August 1977 promotion of the Foreman to that position.

The Company claims through the testimony of the Foreman that when he handed the Grievant a copy of the Memorandum announcing his appointment as Foreman, the Grievant, "Balled it up, throwed it in the truck, jumped in the truck, slammed the door and drove off." The Foreman further testified that, as a result of this incident, "I figured that I was going to have a problem," and that he anticipated, "I would probably have problems getting work done the way I wanted to have it done."

Conversely, the Grievant testified that on the day of the Memorandum it was a holiday week-end and that he was "getting ready to go home" and that when the Memorandum was handed to him, he "glanced at it, read it, threw it in the truck" and went home.

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The differences in opinion regarding the Grievant's reaction to the Memorandum must be disregarded inasmuch as there was no evidence adduced at the Hearing which would establish the existence of animosity on the part of the Grievant for either the Foreman or the Coordinator, or that any prior personal conflict existed between them.

When these facts regarding the Grievant are taken together with his testimony that when the Coordinator first came to the Company he had, on his own time, joined in orienting the Coordinator by "Show[ing] him all the lines." These circumstances are not consonant with the claim that a hostile attitude existed between the Grievant and Management. Consequently the Company's charge with respect to "confusing and embarrassing management" is absent foundation.

The Company also contends that the Grievant has a prior record of insubordination and violation of safety regulations. It points to an incident in April 1978 when the Grievant violated safety regulations, when by his own decision, he undertook work on a customer's line, and absent company approval. It points to November 1978 when the Grievant was insubordinate by falsely reporting a closed valve was in fact, open.

Controversy exists as to what actually occurred on each of these occasions. However, resolution of the differences becomes moot in view of the critical fact that the Company never even confronted the Grievant. Neither situation then lends itself to being an element in progressive discipline — and indeed in the absence of any confrontation with the Grievant, neither situation can now rise to the level of demonstrating that he was less than a "satisfactory" employee. Nor is there any disciplinary record which would establish this fact.

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With respect to the triggering incident the Company asserts that the Grievant has, throughout the grievance proceedings, taken the position that he did not know why he had closed the valve, stating simply that "he had made a mistake." It points to his testimony at the Hearing where he testified that, "I shut the four-inch by-pass valve off and I figured if he had lots of gas, I thought I might as well shut this valve off to build the line back up." At this juncture the Company then asserts that this change in position by the Grievant serves to establish that his current explanation is, "frivolous and not worthy of belief as to his true motives."

Analysis of the record indicates, however, that this position of the Company fails to take into account the chronology of events which was prepared by the Coordinator (Joint Exhibit-J) on February 9, 1978, and which provides in pertinent part in his 12:30 P.M. notation:

> . . . I asked Al [Grievant] why he had shut the other gate and he said he had thought we didn't need that gas either. I asked what he was thinking and he said that he had made a mistake . . .

Accordingly, the Company's argument that the Grievant's testimony in this respect should be discounted, is without substance.

Based on the foregoing, it is found that the Company has failed to adduce evidence which would support its charges in this matter. Absent is any conclusive evidence of motivation on the part of the Grievant to intentionally sabotage the Company by deliberately restricting the flow of gas.

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On the other hand, the Union's claim that the Grievant's actions can only result in a finding of a violation of Rule No. 2 of the Company's Rules of Conduct, violation of a Safety Rule or Safety Practice and/or Rule No. 7, Performing other than assigned work, without authority, is rejected. While each of these rules has a certain pertinence to the act in question, each must be dismissed on its very face as not governing. Accordingly, the penalty attaching to a breach of either of these rules would be inappropriate in this situation.

The Grievant admittedly acted errantly, beyond his assigned authority, and beyond the scope of his Foreman's orders, and certainly the fact of the potentially dangerous situation cannot be set aside. Even though the Grievant did not act with intent to cause serious problems for the Company, he did nevertheless act beyond the scope of a clear and explicit order. Accordingly, while his actions in the instant matter do not warrant discharge, they do warrant severe penalty.

Parenthetic observation is made to the extent that while the Company has submitted a partial record of an investigation of the February 9, 1979 incident which was conducted by the Pennsylvania Public Utilities Commission (Company Exhibit-8) in order to emphasize the critical nature of the Grievant's actions, that same record, on page 22, reveals through the testimony of the Coordinator that he believed that the valve was turned off by mistake.

The undersigned is not unmindful of the possible grave consequences which could attach to the matter under review here. The gravity of the situation can not in and of itself serve as the determining factor. Certainly if it were shown that the Grievant had in fact acted intentionally and for the purpose of restricting

the flow of gas, the "gravity" of the matter would dictate his removal from the work force. Since the record in major portion establishes the Grievant's act to be one of inadvertence, albeit, reckless, a penalty lesser than discharge must prevail and the Grievance must be sustained to the extent provided for hereinbelow.

Appendix D

AMERICAN ARBITRATION ASSOCIATION, Administrator

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between KANE GAS LIGHT AND HEATING COMPANY

AND

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL NO. 112 BOTH OF KANE, PENNSYLVANIA

Case Number: 55-30-0206-79

Award of Arbitrator(s)

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated July 31, 1979, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD, as follows:

> The grievance is sustained to the extent that the Grievant is to be reinstated with effect from thirty days following the date of discharge. The period running from the date of discharge to the date of reinstatement shall be treated as a Disciplinary Suspension.
>
> Back pay is granted to the extent of the difference between earnings and Unemployment Compensation, and that amount which the

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Grievant would have received as earnings had he worked subsequent to his reinstatement as effected herein.

The undersigned retains jurisdiction for the resolution of any differences arising out of the implementation of this Award.

s/ Charles L. Mullin, Jr.

March 10, 1980
Pittsburgh, Pennsylvania

No. 82-1046

In The

Supreme Court of the United States

October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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No. 82-1046

In The

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October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,

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INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

Since filing its reply to the respondent's opposition brief, on February 15, 1983, petitioner has learned only today, February 16, of a recent decision (not yet reported) entered January 28, 1983 by the Supreme Court of Pennsylvania which gives important judicial support of the petitioner's contentions in this case.

Attached as Appendix A, is a copy of the unanimous opinion of that court, written by Chief Justice Samuel J. Roberts in the

case of *Philadelphia Housing Authority v. Union of Security Officers No. 1* (Pa. Supreme Court Appeal No. 81-3-404).

At issue on that appeal was the validity of an award of an arbitrator which reinstated a security officer employed by appellant, Philadelphia Housing Authority, whom the Authority had discharged. The Authority's petition to modify or correct the arbitrator's award was denied by the Court of Common Pleas of Philadelphia, and the denial was affirmed by a divided panel of the Commmonwealth Court [*Philadelphia Housing Authority v. Union of Security Officers No. 1*, 55 Pa. Cmwlth. Ct. 640, 423 A. 2d 1123 (1980)]. The Supreme Court of Pennsylvania granted allowance of appeal, and by its order entered January 28, 1983, reversed the order of the Commonwealth Court and vacated the award of the arbitrator.

The factual situations and the legal principles involved are similar in both the *Philadelphia Housing* case and the pending *Kane Gas* case.

The Pennsylvania Supreme Court concluded that on the facts found by the arbitrator in the *Philadelphia Housing* case, that he was without authority to overturn the Philadelphia Housing Authority's discharge of the employee, and it held that the arbitrator's decision to reinstate the employee was unjustified by any terms that were or could properly have been contemplated by the parties to the collective bargaining agreement. The Pennsylvania Supreme Court's reasoning can equally apply to the present case.

Since the reasoning and holding of the Supreme Court of Pennsylvania and the United States Court of Appeals for the Third Circuit appear to be in conflict on the same matter — judicial review of an arbitrator's award — the petitioner suggests that such conflict should be considered by the Supreme Court of the

United States as an additional reason for granting the writ of certiorari in this pending case.

Respectfully submitted,

JOHN A. BOWLER
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Attorneys for Petitioner

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 81-3-404

ARGUED: October 26, 1982

FILED: January 28, 1983

PHILADELPHIA HOUSING AUTHORITY,

Appellant

V.

UNION OF SECURITY OFFICERS #1

Appeal from an order of the Commonwealth Court at No. 862 C.D. 1979, entered December 31, 1980, affirming an order of the Court of Common Pleas of Philadelphia, at No. 65 January Term, 1979, entered March 27, 1979.

OPINION OF THE COURT

ROBERTS, C.J.

At issue on this appeal is the validity of an award of an arbitrator which reinstated a security officer employed by appellant Philadelphia Housing Authority whom the Authority had discharged. The Authority's petition to modify or correct the arbitrator's award was denied by the Court of Common Pleas of Philadelphia, and the denial was affirmed by a divided panel of the Commonwealth Court. *Philadelphia Housing Authority*

v. Union of Security Officers No. 1, 55 Pa.Cmwlth.Ct. 640, 423 A.2d 1123 (1980). We granted allowance of appeal, and now reverse the order of the Commonwealth Court and vacate the award of the arbitrator.

The security officer, Richard Green, was discharged on March 27, 1979, for allegedly using his position to obtain for his own benefit $900 belonging to Henry Herbert, an elderly resident at the housing project where Green had worked. Following Green's discharge, appellee Union of Security Officers No. 1 sought reinstatement of Green pursuant to the grievance procedure provided in the collective bargaining agreement between the parties. The agreement provided that "[t]he Authority may for just cause take whatever disciplinary action it deems appropriate at its discretion." When the parties failed to reach an agreement, the union invoked its right to arbitration.

At the arbitration hearing, the arbitrator found that Green, by virtue of a relationship of trust and confidence with Herbert, had induced Herbert to deposit $900 in a joint bank account, ostensibly as a fund for Herbert's funeral expenses, that Green had withdrawn the money for his own use, and that Green had lied to his employer during the investigation of his conduct. Despite these findings, the arbitrator reinstated Green without loss of seniority or other benefits, believing that the loss of back pay for the eight months during which Green had been suspended was "sufficient punishment."

The arbitrator's reinstatement of Green was apparently based on the arbitrator's finding that Green had induced Herbert to part with his money by playing on their personal friendship and not, as alleged by the Housing Authority, by taking advantage of his position as a security officer. Such a distinction, however, does not mitigate the severity of the offense or justify the arbitrator's reversal of the Authority's decision to discharge a

dishonest employee. The defrauding of an elderly tenant, whether friend or stranger, by a housing authority security officer is unquestionably conduct justifying the officer's discharge. Indeed, such dishonest conduct constitutes an affront to the integrity of the entire Housing Authority security force.

It is well settled that an arbitrator's award will be upheld if the arbitrator's interpretation of the collective bargaining agreement is reasonable. See, e.g., *International Brotherhood of Firemen and Oilers, AFL-CIO Local 1201 v. School District of Philadelphia,* 465 Pa. 356, 350 A.2d 804 (1976). Here, however, it is manifestly unreasonable to conclude that the Housing Authority could have intended to bargain away its absolute responsibility to ensure the integrity of its housing security force by discharging an officer who has defrauded one of the very people whom he is paid to protect. Having found that security officer Green had defrauded an elderly tenant and then lied about his conduct, the arbitrator was without authority to overturn the Authority's discharge of Green. As the arbitrator's decision to reinstate Green was unjustified by any terms that were or could properly have been contemplated by the parties to the collective bargaining agreement, the order of the Commonwealth Court affirming that decision must be reversed, and the award of the arbitrator vacated.

Order of the Commonwealth Court reversed, and the award of the arbitrator vacated.

Former Chief Justice O'BRIEN did not participate in the decision of this case.

No. 82-1046

In The

Supreme Court of the United States

October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

Whether the court of appeals, in upholding a decision by the United States District Court for the Western District of Pennsylvania, which in turn enforced a labor arbitration award, properly concluded that the award drew its essence from the collective bargaining agreement and did not violate public policy.

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No. 82-1046

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 687 F. 2d 673 (1982). The opinion and order of the United States District Court for the Western District of Pennsylvania (*id.* at 22a-35a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1982. A petition for rehearing en banc was denied on September 10, 1982 (*id.* at 50a-51a). The petition for writ of certiorari was filed on December 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of §301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. §185(a) is set forth at page 2 of the Petition.

STATEMENT

1. On February 9, 1979, employee R. Alan Pritchard, was assigned to work in the Mt. Jewett, Pennsylvania area for Kane Gas Light and Heating Company, a public utility whose offices are located in Kane, Pennsylvania (Pet. App. 54a-55a).

Pritchard had been ordered by his supervisor to increase gas pressure in the Kane, Pennsylvania area. After accomplishing this, he was later that morning instructed to reduce pressure in Kane by turning off a bypass valve (*id.* at 54a-55a). Pritchard thereupon returned to the regulator station in Mt. Jewett where the bypass valve was located and not only closed that valve but the main valve itself. As a result of the closure of the main valve, the gas line pressure in Kane dropped precipitously (*id.* at 54a-55a). A Company representative was sent to the regulator station and the main valve was turned back on.

Pritchard was questioned by the Company concerning the incident (*id.* at 54a-55a). He advised the Company that his actions had been a mistake and he was thereupon directed to return to

his home. Subsequently, an investigation was conducted and on February 13, 1979, Pritchard was advised by letter that his employment had been terminated (*id.* at 56a).

2. Under the terms of the collective bargaining agreement between Pritchard's Union, Local 112, International Brotherhood of Firemen and Oilers, AFL-CIO, and the Company, a grievance was filed. Because the collective bargaining agreement between the parties did not provide for binding arbitration as to those disputes arising thereunder, the parties by mutual consent agreed to submit the grievance concerning the discharge of Pritchard to binding arbitration (*id.* at 25a). Arbitrator Charles L. Mullin was selected through the auspices of the American Arbitration Association to serve as arbitrator to hear the dispute (*id.* at 25a).

A series of hearings were conducted in Kane, Pennsylvania on October 19 and November 16, 1979 (*id.* at 52a). Subsequent thereto, the parties submitted post-hearing briefs (*id.* at 53a) and on March 10, 1980, the arbitrator rendered his award, supported by an opinion. In his award, he held:

> The grievance is sustained to the extent that the Grievant is to be reinstated with effect from thirty days following the date of discharge. The period running from the date of discharge to the date of reinstatement shall be treated as a Disciplinary Suspension.
>
> Back pay is granted to the extent of the difference between earnings and Unemployment Compensation, and that amount which the Grievant would have received as earnings had he worked subsequent to his reinstatement as effected herein.

> The undersigned retains jurisdiction for the resolution of any differences arising out of the implementation of this Award.
>
> s/Charles L. Mullin, Jr.
>
> March 10, 1980
> Pittsburgh, Pennsylvania

(*Id.* at 62a-63a.)

3. The petitioner sought review of the arbitrator's decision in the United States District Court for the Western District of Pennsylvania (*id.* at 22a). After a motion for summary judgment was filed by the Union (*id.* at 22a) the district court, on December 18, 1980 rendered a decision granting the Union's motion for summary judgment (*id.* at 34a).

The district court rejected all of the grounds advanced by Kane Gas in support of its contention that the arbitration award issued should have been vacated. First, the district court concluded that the arbitrator did indeed make a finding that the Company had failed to sustain its burden of showing proper cause (*id.* at 28a). In addition, the district court also held that the arbitrator was free to decide issues of credibility concerning the testimony of Pritchard (*id.* at 28a-29a). Moreover, the district court upheld the right of the arbitrator to exercise his discretion and, as part of his remedy, ordered that the discharge be reduced to a thirty day suspension (*id.* at 29a, 62a).

In the district court's view, those federal statutes and United States Department of Transportation regulations governing transmission of natural gas in interstate commerce did not represent a basis for vacating the arbitration award reinstating Pritchard (*id.* at 29a-30a). The district court held that, regardless

of the dangers inherent in the situation that ultimately led to Pritchard's discharge, the question of whether Pritchard's conduct warranted discharge was something for the arbitrator (*id.* at 30a).

The district court went on to conclude that its scope of review was severely circumscribed by the decisions of the United States Supreme Court in *United Steelworkers v. Enterprise Corporation*, 363 U.S. 593 (1960) and *United Steelworkers v. American Manufacturing Company*, 363 U.S. 554 (1960) and the court of appeals in *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F. 2d 1123 (3d Cir. 1969) (*id.* at 31a-32a).

The district court thus entered judgment for the Union and against the Company and ordered the arbitration award reinstating Pritchard to his position enforced (*id.* at 34a). The court reserved for determination at a later date the question of an award of attorney's fees to the Union (*id.* at 35a).

4. An appeal was filed by Kane Gas from the decision of the district court. The court of appeals remanded the matter to the district court for want of an appealable order, given the fact that the district court had not made a decision with regard to the Union's petition for attorney's fees.[1] After remand, the district

---

1. This decision by the court of appeals was reported at 672 F. 2d 903 (3d Cir. 1981). The court of appeals relied on its rule then prevailing, as enunciated in *Croker v. Boeing and Company*, 662 F. 2d 975 (3d Cir. 1981). Subsequent to the court of appeals decision in *Croker*, the Supreme Court decided in *White v. New Hampshire Department of Employment Security*, ___ U.S. ___, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982) that a motion for attorney's fees raises legal issues which are only collateral to the merits of the main cause of action and accordingly such a motion need not be made within the ten day period permitted by Fed. R. Civ. P. 59(e) for motions to alter or amend judgments.

court entered an order on December 23, 1981 which rejected the Union's petition for attorney's fees (*id.* at 6a-7a).

Again, the Company appealed from the order of the district court while the Union filed a cross-appeal in order to challenge the decision of the district court denying its petition for attorney's fees (*id.* at 7a).

5. The court of appeals affirmed the decision of the district court which required enforcement of the arbitration award reinstating Pritchard (*id.* at 2a). In reaching its decision, the court of appeals rejected the Company's assertion that the arbitrator had somehow disregarded the terms of the collective bargaining agreement, thus rendering a decision that was arbitrary and capricious (*id.* at 7a). Relying on its own decision in *Ludwig Honold Mfg. Co. v. Fletcher,* 405 F. 2d 1123 (3d Cir. 1969) for the proposition that the scope of review of a labor arbitration award is extremely narrow, the court of appeals concluded that, regardless of its own sentiments which questioned the wisdom of the arbitrator's decision, nonetheless the arbitrator's decision drew its essence from the collective bargaining agreement and required enforcement (*id.* 7a-10a).

Accordingly, the court of appeals concluded (*id.* at 14a):

> Reduced to its essence, then, the Company's argument consists of complaints that the arbitrator incorrectly interpreted the agreement in light of the evidence and that his findings were erroneous. Based on our review of the transcripts and the documentary evidence, we are inclined to agree, the arbitrator's decision was indeed a dubious one. Nevertheless, we are satisfied that the arbitrator stayed well within the confines of the collective bargaining agreement and the submitted grievance.

> Thus, while we would not have made the findings by the arbitrator, and would not have evaluated the evidence as he did, we see no basis under the standard established in *Ludwig v. Honold* [sic] for disturbing the arbitrator's award.

Also raised with the court of appeals was the Company's contention that the arbitration award somehow violated public policy. The court of appeals rejected this alternative attack upon the arbitration award, noting that the challenge appeared to be derived from a footnote in its opinion in *Ludwig Honold, supra,* specifically the suggestion that a court decline to enforce an arbitrator's award on the ground of "inconsistency with public policy". 405 F. 2d at 1128, n. 27 (*id.* at 14a). The court of appeals went on to hold that the public policy basis for vacating arbitrator's award applies only where the award itself would conflict directly with either federal or state law (*id.* at 15a). According to the court of appeals, where enforcement of an arbitration award would in essence sanction violations of specific federal or state law then a basis might exist for vacating the award (*id.* at 16a).

The court of appeals held that enforcement of the arbitrator's award which clearly provided for a penalty, *i.e.*, a thirty day suspension, would hardly amount to "judicial condonation" of illegal acts (*id.* at 17a). Moreover, the court of appeals concluded that there was no federal or state law that would compel discharge under the circumstances and therefore the award could not be vacated on the ground that it was inconsistent with public policy (*id.* at 17a). The court of appeals then rejected the appeal of the Union from the decision of the district court denying the Union's petition for attorney's fees (*id.* at 18a-19a).

REASONS FOR DENYING THE WRIT

1. The decision of the courts below that the arbitration award of Charles L. Mullin, Jr. drew its essence from the collective bargaining agreement and a Company attack upon the award based on the grounds that the arbitrator somehow erred in his conclusion cannot be used as a basis for overturning such an award — follows the principle adopted by that court in *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F. 2d 1123 (3d Cir.). That principle has also been accepted by virtually every other court of appeals that has addressed this issue. *See Amoco Oil Company v. Oil Chemical and Atomic Workers International Union, Local 7-11*, 548 F. 2d 1288 (7th Cir.) *cert. denied*, 431 U.S. 905 (1977); *Campo Machinery Co., Inc. v. Local Lodge No. 1926, International Association of Machinists*, 536 F. 2d 330 (10th Cir. 1976); *General Drivers v. Sears Roebuck and Company*, 535 F. 2d 1072 (8th Cir. 1976); *Aloha Motors v. ILWU Local 142*, 530 F. 2d 848 (9th Cir. 1976); *Crigger v. Allied Chemical Corp.*, 500 F. 2d 1218 (4th Cir. 1974); *International Union of Electrical, Radio and Machine Workers v. Peerless Pressed Corp.*, 489 F. 2d 768 (1st Cir. 1973); *Safeway Stores v. American Bakery and Confectionary Workers International Union Local 111*, 390 F. 2d 79 (5th Cir. 1968). Those decisions are all derived from the decisions of the Supreme Court in the *Steelworker Trilogy: United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Accordingly, review by this Court is not warranted, given that the underlying nature of the petitioner's challenge lies in the petitioner's belief that the arbitrator erred.

2. Contrary to petitioner's contention (Pet. 7-15), the arbitration award reinstating Pritchard to his position violated no public policy. The petitioner can point to no federal or state

statute which mandated that Pritchard be terminated from his position. The arbitrator's award does not reinstate an individual to a position which, by law, the individual can no longer fill.

Had Pritchard, as a result of the events of February 9, 1979, lost a license, the possession of which by virtue of federal or state law, was necessary to perform his job then the Company might be in a position to assert that an award reinstating Pritchard to that position to which the license is necessary would violate public policy. However, at no point in the proceedings has the petitioner ever demonstrated that federal law or regulation or state law mandates Pritchard's discharge or establishes certain conditions that Pritchard, by virtue of the actions of February, 1979, can no longer meet. The Company's failure to make any demonstration whatsoever in this regard completely undercuts its contention that the arbitration award in question should not be sustained. The court of appeals therefore correctly concluded that the award, no matter how much the court itself disagreed with the findings and decisions of the arbitrator as contained therein, warranted enforcement.

Absent that demonstration that federal or state law either mandated Pritchard's discharge or that his reinstatement offends an express statute, the court of appeals really had no alternative but to uphold the award. Once the Company failed to make the demonstration just described, then its public policy argument is reduced merely to a suggestion that, in light of the legal obligation that the Company transport and handle natural gas in a safe manner, that it would not be wise to continue Pritchard's employment. This is clearly an argument that is appropriate for an arbitrator; a party asking a court, upon review, to consider such an argument is, in essence, asking that forum to place itself in the role of the arbitrator, a position foreclosed by the *Steelworker Trilogy*.

3. The question of the burden of proof, raised by the petitioner (Pet. 14-15), was implicitly considered by the court of appeals. Indeed, the court of appeals directly noted, ". . .the arbitrator expressly rejected the Company's contentions that Pritchard 'was insubordinate and deliberately restricting the flow of gas' or that Pritchard intentionally sabotaged the Company by such an act." (Pet. App. at 13a). The court of appeals had earlier concluded in a footnote that there was evidence in the record to support this contention (*id.* at 11a, fn. 8). Thus, the court of appeals merely concluded that the arbitrator had found evidence on which to base his opinion and correctly concluded that it would not, in light of the narrow scope of review, disturb the arbitrator's findings. In essence, the court of appeals found that the arbitrator had a basis for deciding that the Company had failed to meet its burden of proof.

The Company's attempt to suggest that the arbitrator employed a different standard of proof than that to which the parties stipulated at the arbitration hearing (Pet. 14) when he wrote that there was no conclusive evidence of improper motivation on Pritchard's part (Pet. App. at 25a) misconstrues the arbitrator's opinion. All that the arbitrator decided was that based on the evidence before him, he was not satisfied that the Grievant had acted intentionally and that accordingly there was insufficient evidence to justify a discharge. In other words, the arbitrator decided that the Company had failed to offer evidence sufficient to permit him to reach the conclusion that Pritchard acted with improper motivation. The arbitrator neither implicitly nor explicitly decided that the burden of proof was anything other than that which the parties stipulated to; any attempt to suggest otherwise is the result of semantical confusion. The arbitrator's conclusions concerning improper motivation hardly changes the burden of proof, thereby making the Company's argument merely a challenge to the arbitrator's findings, a challenge which the court of appeals correctly rejected (*id.* at 14a).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 82-1046

In The

Supreme Court of the United States

October Term, 1982

KANE GAS LIGHT AND HEATING COMPANY,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS, LOCAL 112,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petitioner, Kane Gas Light and Heating Company, replies to statements made in respondent's opposition brief, as follows:

Note: Respondent's brief at page 2, under the heading "Jurisdiction" also misstates the date of the filing of the petition for a writ of certiorari as December 9, 1982. The petition was filed and docketed on December 8, 1982, of which fact the respondent has been duly notified.

With Respect to Inaccurate and Misleading Statements Appearing in Respondent's Brief

1. Although the respondent does not express a dissatisfaction with petitioner's statement of the case, nevertheless, the respondent has made a counter statement (in abbreviated form) of certain facts, which statement is inaccurate and incomplete. It is an apparent effort to mislead this Court into believing that the discharged employee had only made a mistake of judgment of such minor nature as would not merit discharge. Truly, that was not the situation at all.

Compare the respondent's statement made in its brief (at pages 2 and 3) with the facts set forth in petitioner's statement (Pet. at 3-6) and with the facts stated by Judge Garth in his opinion for the Third Circuit (Pet. at 2a-5a) and with the facts stated by Judge Knox in his opinion for the district court (Pet. at 22a-25a) and with the facts recited by the arbitrator in his opinion (Pet. at 54a-56a).

Pritchard had been employed by the Company for seven years in the Borough of Mt. Jewett (where Pritchard lived) as a field worker who performed work under direct instructions of his foreman. Pritchard had no judgmental discretion in the operation of any of the gas valves at the Mt. Jewett regulator station. He opened and closed those valves only on the specific instructions from his supervisors. Pritchard was well aware, however, of the functions of the two valves in question.

As stated by Judge Garth for the circuit court (Pet. at 3a):

> One was a "by-pass valve", which could be opened to increase the gas flow at times of increased demand for gas; the other was a "main valve", which was used only if it became necessary for

testing or repair purposes to shut off the main gas transmission line entirely.

Pritchard was *not* ordered by his supervisor "to increase gas pressure in the Kane, Pennsylvania area" (as respondent states in its brief at p. 2). Correctly stated, Pritchard, in Mt. Jewett, was specifically instructed by his foreman in Kane, via radio, to "open the by-pass valve" (Pet. at 4 and 55a).

Pritchard was *not* instructed "to reduce pressure in Kane by turning off a by-pass valve" (as respondent states in its brief at p. 2). Correctly stated, Pritchard, in Mt. Jewett, was ordered by the foreman by radio from Kane "to close the by-pass valve" (Pet. at 4 and 55a), and Pritchard reported by radio back to his foreman in Kane that he had "closed the by-pass valve" (Pet. at 4 and 55a). (That valve was closed by a wheel.)

However, unknown to, and concealed from, his foreman and supervisors, was the fact that Pritchard also closed the "main valve" in a different part of the regulator station in Mt. Jewett. (That valve was closed with a wrench.) By the closing of the "main valve", Pritchard effectively cut off most of the gas being transported from Mt. Jewett to the Borough of Kane, when the temperature stood at about zero degrees Fahrenheit. Thereafter, a dangerous drop in pressure was noted in Kane, and the supervisors there, being unable to raise Pritchard in Mt. Jewett, on the radio or by telephone, had the foreman drive from Kane to Mt. Jewett (a distance of nine miles) to find out what was happening. The foreman found that the "main valve" had been closed by Pritchard. The foreman turned the "main valve" back on. The loss of adequate gas supply had lasted for forty-five minutes.

2. With respect to the statement in the respondent's brief at page 4 about the U.S. Department of Transportation regulations governing transmission of natural gas in interstate commerce, with the possible implication that the petitioner-Company's lines would not be covered, it should be noted that those regulations and the provisions of the Natural Gas Pipeline Safety Act of 1968, do in fact apply to the pipelines of the Kane Gas Company (*see* Pet. at 41a).

3. Respondent's brief misstates the facts when it recites (at page 2 of its brief) "the parties by mutual consent agreed to submit the grievance concerning the discharge of Pritchard to *binding* arbitration" (emphasis supplied; *citing* Pet. at 25a). That citation to Judge Knox's district court opinion *does not* refer to any agreement for *binding* arbitration. Also as shown by a footnote to Judge Garth's circuit court opinion (Pet. at 5a), the Company had contended it had not agreed to "binding" arbitration, and that contention was not ruled upon by either the district or the circuit court.

4. The respondent, at page 7 of its brief, also misstates the language of the court of appeals (Pet. at 15a) when the brief states that the public policy basis for vacating arbitrator's awards applies only where the award *itself* would conflict directly with either federal or state law. The word "itself" was added by the respondent. Further on, in Judge Garth's opinion (Pet. at 16a), the circuit court approved the holding of *General Teamsters, et al. Local 249 v. Consolidated Freightways,* 464 F. Supp. 346 (W.D. Pa. 1979) stating:

> *Consolidated Freightways* stands for the proposition that an award is inconsistent with public policy when it would condone violations of federal or state law. The decisions of other circuits

> suggest *that absent such a finding that an award condones a violation of federal or state law,* the strong federal policy of encouraging labor arbitration dictates the enforcement or arbitration awards.

5. The respondent's brief at page 7 misstates the language of the court of appeals when it states that the court concluded "that there was no federal or state law that would compel discharge." Correctly stated, the circuit court concluded (Pet. at 17a):

> The Company has not brought to our attention any federal or state law that would compel the harsher sanction of discharge, no doubt because no such law exists. Thus, we conclude that the award here cannot be vacated on the ground that it is inconsistent with public policy.

The petitioner-Company did in fact submit to the circuit court the federal and state laws which required the Company (and naturally its employees) to operate its gas distribution business in a safe manner in accordance with federal regulations.

The petitioner-Company did in fact call the circuit court's attention to the provisions of the Pennsylvania Crimes Code — by a timely petition for rehearing before the court en banc (Pet. at 41a-44a), which the circuit court declined to consider, by dismissal of the petition for rehearing.

6. Respondent's brief at page 10, misstates the language of the arbitrator where it says, that ". . . he wrote that there was no conclusive evidence of *improper* motivation on Pritchard's part (Pet. App. at 25a) . . ." and where it states "the arbitrator's conclusions concerning *improper* motivation hardly changes the

burden of proof." The respondent has seen fit to insert the word "improper" before the word "motivation" at two places. The arbitrator had not referred to "*improper* motivation" at all. In passing, it should be noted that the motivation was crystal clear as to why he shut the "main valve". It was to shut off the gas to the Borough of Kane.

7. The respondent's statement in its Brief, omits reference, not only to the concealment by Pritchard of his act of shutting off the "main valve", but also omits reference to the fact that the Company's discharge of Pritchard was prompted by reasons of safety.

With Respect to Respondent's Argument

8. Pritchard's defense of his action in shutting the main valve, as being a "mistake" is not a credible one. He deliberately and knowingly shut the valve — to shut off the gas supply to Kane. His purpose, he stated at one time was that "he had thought (Kane) didn't need that gas either"; at another time he stated his purpose was "I shut the four inch by-pass valve off and I figured if he had lots of gas, I might as well shut this valve off to build the line back up" (Arbitrator's Opinion — Pet. at 59a). At another time, during the hearing, his sole explanation for his conduct was that he "just thought (he) was saving the Company some money." (Circuit Court's Opinion — Pet. at 10a).

9. Judge Garth, in his opinion for the circuit court (Pet. at 5a) stated:

> Considering the severity of the weather, Pritchard's actions in closing the main valve could easily have resulted in danger to life as well as substantial property damage.

Judge Knox, for the district court (Pet. at 23a-24a) stated:

> The hazards of turning off the gas completely in weather such as this is demonstrated by the testimony at the arbitrator's hearing, page 12, to the effect that one of the gravest dangers is that when the transmission line is void of gas, the pilot lights go out on appliances and furnaces, leaving the valve open with the result when it returns, there is an explosive concentration of gas and air and could cause possibly catastrophic results.

The arbitrator (Pet. at 60a) stated:

> (Pritchard) admittedly acted errantly, beyond the scope of his assigned authority, and beyond the scope of his foreman's orders, and certainly the fact of the potentially dangerous situation cannot be set aside.

On the findings of the circuit court, the district court and the arbitrator, it must be concluded that Pritchard's misconduct in recklessly and secretly closing the "main valve" to shut off the main supply of gas to Kane, created a risk of catastrophe by explosion and fire and from lack of heat, with potential dangers to persons and to property. That type of misconduct is regarded as very serious in Pennsylvania, with a penalty for greater than a thirty day suspension.

Such conduct is prohibited by the Pennsylvania Crimes Code of 1972 [18 Purdon C.P.S.A. 3302(b)] (Pet. at 42a), relating to "Risking a Catastrophe" which section defines the offense as a felony in the third degree which carries a penalty of imprisonment up to seven years and a fine of up to $15,000 (18 Purdon C.P.S.A. §§1101 and 1103).

The penalty for a misdemeanor of the second degree, provided for in the Pennsylvania Crimes Code, for "Failure to Prevent Catastrophe", "Criminal Mischief" and "Recklessly Endangering Another Person" cited in the petition at pages 42a-44a, is imprisonment up to two years and a fine not exceeding $5,000 (18 Purdon C.P.S.A. §§1101 and 1104).

10. The petitioner submits some additional questions to the Court. If this arbitrator's award is not set aside, what defense, moral or legal, is available to the Company if its rehired employee, intentionally, recklessly or negligently, caused bodily harm or property damage to others in the course of his employment?

Would it be a proper moral or legal justification for the Company to claim that the rights of the citizens of Kane and Mt. Jewett must give way to a requirement that the courts would not set aside an arbitration award which required the retention of a reckless employee?

Justice Holmes spoke with common sense and wisdom when he stated for this Court in *Beasley v. Texas & Pacific Railway Co.*, 191 U.S. 492 (1903) at page 498:

> But the very meaning of public policy is the interest of others than the parties and that interest is not to be at the mercy of the defendant alone.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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